115-339

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1010~~ ~~669~~ ~~3505~~ 4

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

P. H. PENDLETON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED 12th OCTOBER, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 1019.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

P. H. PENDLETON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED 12TH OCTOBER, 1881.

INDEX.

	Original.	Print.
Style of Court and Cause	1	1
Transcript State Court	2	1
Pleas of Defendant	18	6
Replication	25	8
Order of Continuance, May 28, 1878	28	9
Order of Continuance, December 13, 1878	29	10
Order setting Case for trial	30	10
Order of Court, January 7, 1881	31	10
Order of Court, Jury trial commenced	33	11
Order of Court, Jury trial continued	35	12
Order of Court, January 10, 1881	36	12
Bill of Exceptions	37	12
Policy of Insurance	37	13
Renewal Receipt	39	15
Letter of A. O. Douglass	40	16
Letter of Greene & Lucas	42	16
Letter of W. F. Douglass	44	17
Letter of W. F. Douglass	45	17
Letter of Greene & Lucas, answer	47	18
Stipulation	52	19
Draft of S. H. Pendleton	54	20
Deposition of A. Luria	55	20
Deposition of Charles Santana	64	24
Withdrawal of Fifth Plea	69	25

	Original.	Print.
Deposition of Moses Greenwood	72	26
Exhibit A (account)	77	28
Exhibit B (Letters of Moses Greenwood & Son, dated September 29 and November 4, 1871)	87	34
Letter of Greenwood to Pendleton	88	34
Evidence of Pleasant H. Pendleton	91	35
Charge of the Court	97	37
Jury Verdict	111	41
Order of Court, May 19, 1881	121	43
Order of Court, May 19, 1881	123	44
Order of Court, May 19, 1881	124	44
Writ of Error	125	45
Citation	126	46
Writ of Error Bond	127	46
Supersedeas Bond	129	47
Clerk's Certificate	144	52

1 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its. .....Term, A. D. 188 , at the United States Court-house, in the city of Memphis, in said district, on, to wit, the ..... day of ..... A. D. 188 , in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

2 Pleas at a term of the Circuit Court of Shelby county, Tennessee, began and held at the Court-house, in the city of Memphis, on Monday, the 17th day of January, 1876, being the third Monday in said month. Present and presiding, the Honorable C. W. Heiskell, judge of said court; also present, B. F. Coleman, clerk, and George J. Campbell, deputy clerk of said court, and W. B. Richardet, deputy sheriff of Shelby county.

And at, to wit, on the 1st day of April, 1876, being one of the days of the January Term, 1876, of said court, the following proceedings were had, to wit:

Summons.

STATE OF TENNESSEE.

To the Sheriff of Shelby county greeting: You are hereby commanded to summon the Knickerbocker Life Insurance Company, of New York city and State of New York, if to be found within
3 your county, personally to be and appear before the judge of the First Circuit Court of Shelby county, at a term of said court to be held for said county at the Court-house in the city of Memphis, on the third Monday in September instant, then and there to answer Pleasant H. Pendleton, Cornelia E. Pendleton, Mary E. Pendleton, and Francis M. Pendleton, minors, suing by their next friend, K. Smith, in an action to their damage fifteen thousand dollars.

Herein fail not, and have you then and there this writ.

Witness B. F. Coleman, clerk of the said court, at office, the third Monday in May, 1875.

B. F. COLEMAN, *Clerk.*
By B. H. COLEMAN, *Deputy Clerk.*

Cost Bond.

P. H. PENDLETON and others
vs.
KNICKERBOCKER LIFE INSURANCE COMPANY.

4 I bind myself to the defendant in the sum of two hundred and fifty dollars for the successful prosecution of this action, to

be void on condition that I pay all the costs which may at any time be adjudged against the plaintiffs, in the event that they shall not pay the same; otherwise to remain in full force.

Witness my hand this 10th day of September, 1875.

HUMES & POSTON. [SEAL.]

(Endorsed:) "Issued 10 day Septr., 1875;" B. H. Coleman, D. C.; "Came to hand 10 day Septr., 1875;" "Executed on the Knickerbocker Life Insurance Company, of New York city and State of New York, by making known contents of this Summons to Colton Green and W. R. Lucas, composing firm of Green and Lucas, Ag'ts K. L. I. Co.; C. L. Anderson, Sh'ff, by M. McMahon, D. S.

5 At, to wit, on the 24th day of September, 1875, being one of the days of the September Term, 1875, of said court, the following appears of record, to wit:

Leave to file Declaration.

P. H. PENDLETON et al.
2936 *vs.* A. D.
KNICKERBOCKER L. INS. CO.

Leave of 10 days is granted plaintiffs in which to file declaration.

In the First Circuit Court of Shelby county, Tennessee.

PLEASANT H. PENDLETON, CORNELIA E. PENDLETON, MARY E. PENDLETON, and FRANCIS M. PENDLETON, minors, suing by their next friend, K. SMITH,
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Pleasant H. Pendleton, Cornelia E. Pendleton, Mary E. Pendleton, and Francis M. Pendleton, all minors, suing by their
6 next friend, K. Smith, sue the Knickerbocker Life Insurance Company, a corporation duly chartered by the State of New York, and having its chief office in the city and State of New York, on a policy of insurance here shown to the court, made by the defendant on the 14th day of July, 1870, by which defendants contracted with plaintiffs, in consideration of $364.60 then paid by him to defendant, and of the like sum of $364.60 to be paid by plaintiffs to defendant on the 14th day of July on every year during this continuance of said policy, to insure for plaintiff's benefit the life of Samuel H. Pendleton in the amount of ten thousand dollars, and to pay said sums to plaintiffs at the office of defendant within three months after due notice and satisfactory proof of the death, during the continuance and before the expiration of said policy, of

7 Samuel H. Pendleton; and plaintiffs allege that on the 14th day of July, 1871, they paid defendant the sum of $364.60, being the premium then due on said policy for the year from July 14th, 1871, to July 14th, 1872, and defendant gave them what is called a renewal receipt, (which is now here to the court shown,) that is, a writing obligatory executed by defendant, acknowledging the receipt from plaintiff of said sum of $364.60, being the premium on policy No. 2,846, (which is the policy sued on in this action,) and which said renewal receipt contained the stipulation of defendant in the words and figures following, viz.: "which" (policy) "is hereby continued in force until the 14th day of July, 1872, at noon"; and plaintiffs further allege that said Samuel H. Pendleton, during the continuance and before the expiration of said policy," to wit,
8 on the — day of March, died, of which due notice and satisfactory proof were given defendant, and after three months thereafter and before the bringing of this suit plaintiffs demanded of defendant the payment of the sum so insured, which was refused, and defendant still refuses to pay the same, to plaintiffs' damage fifteen thousand dollars, for which they now here sue.

HUMES & POSTON.
Atty's for Pl'tffs.

(Endorsed:) Filed Nov. 10th, 1875; B. H. Coleman, D. C.

Petition for Removal.

Circuit Court of Shelby Co., Tenn.

PLEASANT H. PENDLETON et al.
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY of New York City. } No. 2936, A. D.

To the Hon. C. W. Heiskell, judge, &c.: Your petitioner,
9 The Knickerbocker Life Insurance Company of New York city, of the State of New York, U. S. A., would respectfully show that on the 10th day of Sept., 1875, a suit was commenced by summons issued against petitioner as entitled above, and in the name of Pleasant H. Pendleton, Cornelia E. Pendleton, Mary E. Pendleton, and Francis M. Pendleton, minors, suing by their next friend, K. Smith, in an action of damages fifteen thousand dollars. Said suit issued as of above date and was served upon petitioner's agents on Sept'r 11, 1875, and upon Nov. 10, 1875, plaintiffs in said suit filed their declaration, wherein they allege that petitioner is indebted to them upon a certain policy of insurance issued by the petitioner upon the life of one Samuel H. Pendleton, whom they allege is now deceased, for $10,000; wherefore they sue for $15,000 as dam-
10 ages for the failure of said petitioner to pay said insurance.

No pleas have been filed in said suit by petitioner, and said cause stands as hereinbefore represented.

Petitioner shows that it is a corporation created, organized, and doing business under the laws and statutes of the State of New York, and a citizen of a different State so far as plaintiffs are concerned. It alleges that all of plaintiffs in this cause, as well as was said Sam'l H. Pendleton, are not residents or citizens of said State of New York, but are residents and citizens of the State of Arkansas.

Petitioner now tenders and files herewith a bond with good and sufficient security, conditioned for its entering in the Circuit Court of the United States for the Western Division of Tennessee, at Memphis, Tenn., on the first day of the next session hereafter, a
11 copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court if said court shall hold that suit was wrongfully or improperly removed thereto. And the matter in dispute in this cause is of a civil nature and exceeds the sum of five hundred dollars, and is between citizens of different States, and there has been no trial thereupon in the State court; wherefore petitioner prays that said cause may be removed from this court into the Circuit Court of the United States for the Western Division of the State of Tennessee, sitting at Memphis, Tenn., and to the next term to ensue hereafter, under the provisions of the act of Congress of the United States approved March 3d, 1875, entitled "An act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State courts, and for other purposes."

E. L. BELCHER,
Att'y for Petitioner.

12 STATE OF TENNESSEE, }
Shelby Co. }

Personally appeared before me, Ben. F. Coleman, clerk of the Circuit Court of Shelby county, E. L. Belcher, att'y for the Knickerbocker Life Insurance Company of N. Y., who, being duly sworn, made oath that the matters and things stated in the foregoing petition he believes to be true to the best of his knowledge, information, and belief.

E. L. BELCHER,
Att'y, &c.

Sworn to and subscribed before me this the 23d March, 1876.
B. F. COLEMAN, *Clerk.*

(Endorsed:) Filed March 24, 1876; B. F. Coleman, clerk.

Bond.

Know all men by these presents: That we, the Knickerbocker Life Insurance Company, of the city of New York and State

13 of New York, as principal, and Colton Green, surety, are held and firmly bound unto the State of Tennessee for the payment of the sum of five hundred dollars. Witness our hands and seals this the 23d day of March, A. D. 1876. But the condition of this bond is as follows: That whereas the said Knickerbocker Life Insurance Company, of the city of New York and State of New York, has this day filed its petition in the Circuit Court of Shelby county, Tennessee, for the removal of a certain cause therein entitled No. 2936 A. D., Pleasant H. Pendleton et al., by next friend, K. Smith, *vs.* said Knickerbocker Life Insurance Co., and which was instituted by summons issued on 10th day of September, 1875, from said court to the Circuit Court of the United States for the Western Division of Tennessee, sitting at Memphis, Tenn., and to the next term thereafter: Now, if said Knickerbocker Life Insurance Company
14 of New York shall, on or before the first day of the next session of the United States Circuit Court for the Western Division of Tennessee, at Memphis, Tenn., as aforesaid, enter therein a copy of the record of this suit and as hereinbefore described, and shall also pay all costs that may be awarded by said Circuit Court if said court shall hold that this said suit was wrongfully or improperly removed thereto, and also thereto appear and enter special bail in said suit if special bail was originally requisite herein, and for them to obey with and comply to the orders of said Circuit Court, then this bond to be null and void; otherwise in full force and effect.

Witness our hands and seals this the 23d day of March, 1876.

GREEN AND LUCAS, [SEAL.]
Manager Knickerbocker Life Ins. Co. of New York.
COLTON GREEN. [SEAL.]

15 And at, to wit, on the 1st day of April, 1876, being one of the days of the January Term, 1876, the following appears of record, to wit:

Order for Removal.

	PLEASANT H. PENDLETON et al.	
2936	*vs.*	A. D.
	THE KNICKERBOCKER LIFE INSURANCE COMPANY OF NEW YORK CITY.	

On motion of defendant, and having filed its petition herein, properly verified, praying for the removal of this cause into the Circuit Court of the United States for the Western Division of State of Tennessee, and it appearing from said petition that the matter in dispute in this cause is of a civil nature, and exceeds the sum of five hundred dollars, and is between citizens of different States, and that there has been no trial thereupon in the State court, and defendant
16 having executed bond in the penalty of five hundred dollars

with Colton Green as security, properly conditioned, &c., it is Ordered, That this cause be removed to the Circuit Court of the United States for the Western Division of the State of Tennessee, upon payment by the defendant of all costs herein in this court, and the clerk of this court will make out and certify a full and correct transcript of all the records and proceedings herein to be filed in said United States Circuit Court.

STATE OF TENNESSEE,
Shelby County.

I, B. F. Coleman, clerk of the Circuit Court of said county, do hereby certify that the foregoing 17 pages contain a full, true, and perfect transcript of the proceedings had in our said court in the cause heretofore prosecuted and determined therein between Pleasant H. Pendleton, Cornelia E. Pendleton, Mary E. Pendleton, et al., by next friend, &c., plaintiff, and Knickerbocker Life Ins. Co.
17 of New York, defendant, as the same appear of record and on file in my office.

In testimony whereof I hereto subscribe my name and affix the seal of said court at office this 11th day of April, 1876.

[L. S.] B. F. COLEMAN, *Clerk.*
By JNO. P. SAMUELS, *D. C.*

(Endorsed:) No. 2144; United States Circuit Court, Western District of Tennessee; Pleasant H. Pendleton and others, by next friend, &c., *v.* The Knickerbocker Life Insurance Co.; transcript of record; filed 17th day of April, 1876; H. E. Andrews, clerk.

18 *Pleas.*

U. S. Circuit Court, Western District of Tennessee, at Memphis, Tennessee.

PLEASANT H. PENDLETON et al., &c.,
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

1. And the said defendant, by attorney, comes and defends, and for plea says that it is not indebted to plaintiffs in manner and form as in said declaration it is alleged, and of this, &c.

2. And the said defendant further says, wherefore said plaintiffs should not have their said action against it, that the policy of insurance sued upon in this case, among other material conditions and agreements, contains the following in these words, viz.: And the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment, or failure to pay at maturity any note, obligation, or indebtedness (other

19 than the annual credit or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void without notice to any party or parties interested herein, with the further condition and agreement clause, "neither the policy of insurance or renewal receipts of the same will be valid until the actual payment of the premium," and defendant says that the said premium of $364.60 due and payable according to said policy at 12 o'clock noon of the 14th day of July, 1871, nor any portion or part thereof was paid by plaintiffs nor any one for them on or before said 14th day of July, 1871, at noon, nor has the same been paid at any time thereafter to defendant; wherefore said defendant says that said policy of insurance sued on terminated on the said 14th day of July, 1871, at noon, and that the death of the said Samuel H. Pendleton did not occur at any time during the continuance of said contract of insurance and before the termination thereof.

3. And the said defendant, for further plea, says that on the 14th day of July, 1871, being the day whereon the annual sum of
20 $364.60 became due and payable under the conditions of said policy of insurance sued on, plaintiffs did not pay the same, but the said Samuel H. Pendleton, subject to the clauses and conditions recited and set forth in the foregoing second plea, executed and delivered to defendant the following draft, in the words and figures, to wit:

"$325.00, Auburn, Arks., July 14, 1871. Three months after date, without grace, pay to the order of the Knickerbocker Life Insurance Company three hundred twenty-five dollars, value received, for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity.

(Signed) S. H. PENDLETON.

To Moses Greenwood & Son, New Orleans, La."

Said policy No. 2346 therein mentioned being the said policy of insurance sued on in this action. And said defendant avers
21 that said S. H. Pendleton had no funds in the hands of the said Moses Greenwood & Son, New Orleans, La., nor any reasonable expectation that the said draft would be paid, and further avers that said draft nor any part thereof was not paid on three months thereafter, not allowing days of grace, nor at any time, whereby said defendant avers that said policy of insurance terminated and became void on the 14th day of October, 1871, and that the said death of S. H. Pendleton did not occur prior to said 14th of October, 1871, and during the continuance of said policy.

4. And said defendant further says that said contract of insurance is not payable until within three months after due notice and satisfactory proof of the death of said insured, and it avers that said plaintiffs have never duly notified said defendant and made satisfactory proof of the death of said S. H. Pendleton to it as required and

provided for in said contract of insurance prior to or since the
22 bringing of this suit.

5. And for further plea said defendant says that said contract of insurance contains, among other clauses, the following: "Neither this policy of insurance, or renewal receipts of the same, will be valid until the actual payment of the premiums; that the renewal receipt described and set forth in plaintiffs' declaration was given for the draft of the said S. H. Pendleton on Moses Greenwood & Son, New Orleans, La., described particularly in defendant's 3d plea herein, and which said draft was given and accepted on the agreement and contract expressed therein, that if not paid at maturity thereof said policy No. 2346, the same as sued on, should be void, and defendant says that neither said draft, nor any part thereof, was paid at maturity, wherefore said policy of insurance became void on the 14th day of October, 1871; and defendant avers that said S. H. Pendleton's death did not occur at any time prior to the
23 14th October, 1871, nor during the continuance of said policy. Wherefore, &c.

E. L. BELCHER,
Att'y for Def't.

5. And said defendant further alleges that said policy of insurance sued on contains a clause and agreement to this: that if said Samuel H. Pendleton should become so far intemperate as to evidence *delirium tremens*, or (shall) should die in consequence thereof, then said policy to be null and void; and said defendants aver and allege that the said assured did become so far intemperate as to die in consequence thereof, whereby said policy became forfeited, null and void; and of this defendant is ready to verify.

E. L. BELCHER, *for Def't.*

(Endorsed:) No. 2144; United States Circuit Court, Western District of Tennessee; P. H. Pendleton et al. *v.* Knickerbocker Life Ins. Co.; law; pleas; filed May 11, 1876; H. E. Andrews, clerk;
24 L. H. Pillsbury, D. C.; E. L. Belcher.

25 *Replication.*

In the Circuit Court of the United States for the Western District of Tennessee.

PLEASANT H. PENDLETON and others
2144 *v.*
THE KNICKERBOCKER LIFE INS. CO.

1. The plaintiffs join issue with defendant on its first plea.

2. And for replication to defendant's second plea, the plaintiffs say the defendant waived the payment on the 14th day of July, 1871, of the premium on the said policy falling due on that day for a valu-

able consideration moving to the defendant. Wherefore the plaintiffs say that said policy did not terminate on the said day, and that the death of the said Samuel H. Pendleton did occur during the continuance of the said contract of insurance, and before the termination thereof, and this they are ready to verify, &c.

3. And for a replication to defendant's third plea, the plaintiffs say that said Pendleton did have funds in the hands of the said Moses Greenwood & Son, or reasonable expectation that the said draft would be paid, and this they are ready to verify.

26 4. And for a replication to defendant's fourth plea, the plaintiffs say that due notice of the death of the said insured was given defendant, and that defendant waived proof of his death being made to the defendant.

5. And for replication to defendant's fifth plea, the plaintiffs say the said draft was not presented for payment at its maturity, as the defendant undertook and was bound to do, and therefore the said policy never became void, and this it is ready to verify, &c.

6. And for a replication to defendant's sixth plea, the plaintiffs say that the said insured did not become so far intemperate as to die in consequence thereof, and this they pray may be inquired of by the country.

HUMES & POSTON,
Att'ys for Pl'ff's.

Issues accepted and agreed upon.

E. L. BELCHER,
Deft's Att'y.

27 (Endorsed:) 2144, Law Docket; in the United States Circuit Court for Western District of Tennessee; Pleasant H. Pendleton and others *v.* The Knickerbocker Life Insurance Company; Replication; found among the papers and filed January 5, 1881; Bell W. Etheridge, clerk; W. B. Weisiger, D. C.

28 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1877, at the United States Court-house, in the city of Memphis, in said district, on, to wit, the 28th day of May, A. D. 1878, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

Before Hon. John Baxter, Circuit Judge. For satisfactory reasons

to the court appearing, the above-entitled cause is continued to the next term of this court.

29 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1878, at the United States Courthouse, in the city of Memphis, in said district, on, to wit, the 13th day of Dec., A. D. 1878, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

The above cause being called for trial, and for satisfactory reasons to the court appearing, it is ordered that the same be continued to the next term of this court, counsel agreeing thereto.

30 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1880, at the United States Courthouse, in the city of Memphis, in said district, on, to wit, the 13th day of Dec., A. D. 1880, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

By consent of counsel, this case is set for trial on Thursday, January 6, 1881.

31 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1880, at the United States Court-

house, in the city of Memphis, in said district, on, to wit, the 7th day of January, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

On motion of plaintiff's attorney, and it appearing to the court that since this suit was brought the plaintiffs, Pleasant H. Pendleton, Cornelia E. Pendleton, and Mary E. Pendleton, have become twenty-one years of age, and that also since the bringing of this suit the plaintiff Cornelia E. Pendleton has intermarried with Charles V. Dixon and is now his wife, it is ordered that the suit now stand in the name of the said plaintiffs in their own right and without
32 the intervention of a next friend, and that as to the plaintiff Cornelia E. the suit be revived and stand as to her in the name of herself and her husband, Charles V. Dixon, suing in her right.

33 UNITED STATES OF AMERICA,
.....*Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1880, at the United States Court-house, in the city of Memphis, in said district, on, to wit, the 7th day of Jan'y, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

In this cause came the parties by their attorneys, and came also a jury of good and lawful men, to wit, P. M. Stanley, N. W. Speers, A. Karr, H. Rosenthal, Geo. Mitchell, Hugh Nott, Wm. Floyd, Minter Parker, E. E. Meacham, L. Podesta, H. G. Hampe and J. F. Schabell, who were duly elected, tried and sworn well and truly to try the issues herein joined between the plaintiffs and defendants, and a true verdict render according to the law and evidence,
34 when the trial of said cause was commenced, and there not being time sufficient to conclude the trial to-day, it is hereby ordered that the further consideration thereof be postponed until to-morrow morning at 10 o'clock.

35 UNITED STATES OF AMERICA,
.....*Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1880, at the United States Court-house, in the city of Memphis, in said district, on, to wit, the 8th day of Jan'y, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

In this cause came again the parties by their attorneys, and came also the jury heretofore empanelled, when the trial of said cause was resumed, and there not being sufficient time to conclude the said trial to-day, it is hereby ordered that the further consideration thereof be postponed until Monday morning next at ten o'clock.

36 UNITED STATES OF AMERICA,
.....*Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1880, at the United States Court-house, in the city of Memphis, in said district, on, to wit, the 10th day of Jan'y, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

The 6th plea of the defendant, relating to the death of Dr. P. H. Pendleton from the use or effects of the use of intoxicating drink, is by request of the defendant and by consent of the court withdrawn, and it is ordered that all testimony taken thereto be excluded from the jury and not used in the trial of this cause.

37 *Bill of Exceptions.*

In the Circuit Court of the United States for the Western District of Tennessee.

On the trial of this case plaintiffs introduced in evidence the policy sued on, in the words and figures following, to wit:

No. 2346. Age 44.

This Policy of Insurance witnesseth that the

KNICKERBOCKER LIFE INSURANCE COMPANY OF THE CITY OF NEW YORK,

Premium, $364.60.] [Insurance, $10,000.

IN CONSIDERATION OF THE PREMIUM OF three hundred and sixty-four dollars and sixty cents to them in hand paid by the children of Samuel H. Pendleton, and of the annual premium of a like sum, to be paid on or before the fourteenth day of July in every year during the continuance of this policy, DO ASSURE the life of Samuel H. Pendleton, of Arkansas county, in the State of Arkansas, in the amount of ten thousand dollars, for the term of his natural life for the benefit of Pleasant H., Cornelia E., Mary E. and Frances M. Pendleton, his children.

PROVIDED, however, that in case an annual credit or loan of a portion of said premium shall be allowed thereon (interest upon which is payable in advance), such credit or loan is acknowledged by all the parties hereto as a just counter-claim against this policy until paid or canceled by profits or otherwise.

IT BEING UNDERSTOOD AND AGREED, that if, after the receipt by this company of not less than three annual premiums, this policy should cease in consequence of the non-payment of premium, then, upon a surrender of the same within thirty (30) days after such unpaid premium shall have been due, the company will, in exchange, issue a paid-up policy, (subject to any loans or credits outstanding against this policy,) for such an amount as the surrender value of the premiums received hereon would purchase as a single premium.

AND THE SAID COMPANY DO HEREBY PROMISE AND AGREE well and truly to pay or cause to be paid, at their office, the said sum insured to the party to whose benefit this insurance shall lawfully enure whenever the same becomes due, —— executors, administrators, or assigns, within three months after due notice and satisfactory proof of the death—during the continuance and before the termination of this policy—of the said party whose life is hereby insured. The balance of the year's premium (if any) or other indebtedness, obligation or counter-claim standing against this policy, at the time when the sum hereby insured becomes due, shall, however, in all cases be first deducted therefrom.

PROVIDED ALWAYS, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted upon the following conditions, that in case the said party whose life is hereby insured shall, without the written consent of this company previously obtained, travel upon the seas (except in voyages between coastwise ports of the United States), or shall pass beyond the civilized settlements in the United States (excepting into the settled limits of the British Provinces, of the two Canadas, Nova Scotia, or New Brunswick), or shall, without such previous consent thus obtained, enter

into any military or naval service whatever (the militia not in actual service excepted), or shall personally engage in blasting, mining, submarine operations, or the production of dangerously inflammable or explosive substances, or in any other extra-hazardous occupation, or die in consequence of a duel, or by the hand of justice, or in consequence thereof, then this policy shall be null and void.

AND ALSO, this policy of insurance is made upon the express condition that application number 2346 now on file in the office of said company is an express warranty of the truth of the answers contained in said application, and in the statements and documents annexed to, or accompanying the same, and that said application, statements and documents shall be deemed to form a part and parcel of this policy. And if the said application, statements or documents are in any respect untrue, then this policy is void and of no effect, either to the insured or any party whatsoever interested herein. And the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein.

AND IT IS FURTHER PROVIDED that in case said company shall, at any time, accept a payment of premium upon this policy after the day when the same shall, by the terms hereof, become due and payable, such acceptance shall not, in any respect, be deemed to enlarge the time for the payment of the annual premiums thereafter to become due upon this policy, or be deemed any evidence of a usage of said company to receive payments of premium after the same become due and payable by the terms of this policy.

All policies, renewals of policies, permits, consents, and contracts, in any way relating to insurance, and all other contracts, endorsements, instruments, or writings, of what kind soever, in the name of the Knickerbocker Life Insurance Company, or undertaking or importing any act to be done, or liability to be incurred by the said company, must be signed by the president and secretary thereof, and whenever not so signed are hereby repudiated and declared void, and will in no case be recognized by the said company.

{One dollar U. S. Internal Revenue Stamp.} Neither this policy of insurance or renewal receipts of the same will be valid until the actual payment of the premium.

Free permits will be granted upon application at the office of the company, to the holder of this policy, to reside in Europe and to make voyages between the United States and Europe, in steamships or *first-class sailing vessels only*. For a voyage by any other vessel or to any other foreign country, except as above stated, a special permit must be applied for and obtained from the company.

This policy is not assignable.

IN WITNESS WHEREOF, the said Knickerbocker Life Insurance

Company have caused this contract to be signed by their president and secretary at the city of New York, this fourteenth day of July, one thousand eight hundred and seventy.

Not valid until countersigned by the managers of the Mississippi Valley Branch Office, Memphis, Tenn.

ERASTUS LYMAN, *President.*

GEO. F. GRIFFEN, *Secretary.*

Countersigned at Memphis, Tenn., this fourteenth day of July, 1870.

S. R. CLARKE & CO., *Managers.*

Edition January, 1869.

Ordinary life policy.—Mutual and non-forfeiting.

38 (Endorsed:) No. 2346, Mississippi Valley Branch Knickerbocker Life Insurance Company of the city of New York, office 18 Knickerbocker building, Madison st., Memphis, Tenn.; Insurance on the life of Samuel H. Pendleton; registered A, folio 177; amount insured $10,000; amount of premium $364.60; policy fee and stamp $; $364.60; $364.60 becomes due annually the 14th day of July; M. I. Garvin, agent.

39 Plaintiffs next introduced in evidence the renewal receipt in the words and figures following, viz.:

Renewal receipt.

Mississippi Valley Branch Office of the Knickerbocker Life Insurance Company at Memphis, Tenn., principal office 161 Broadway, N. Y., renewal No. 94,597.

NEW YORK, *July* 14, 1871.

Received of Pleasant H. Pendleton, &c., three hundred & sixty-four 65-100 dollars, being the premium on policy No. 2346, which is hereby continued in force until the fourteenth day of July, 1872, at noon.

☞ Not valid until countersigned by the managers of the Mississippi Valley Branch office at Memphis, Tenn.

ERASTUS LYMAN, *President.*

GEO. F. GRIFFEN, *Secretary.*

Countersigned at Memphis this day of 18 .

45,432.] GREENE & LUCAS, *Managers.*

40 Plaintiffs next introduced evidence tending to show that Samuel H. Pendleton, the life insured by said policy, died at home, near Auburn, Arkansas, on the 26th day of March, 1872; that his children, the plaintiffs in this suit, were then aged respectively as follows, viz.: Pleasant H., 19 years; Cornelia E., 17 years; Mary E., 12 years, and Francis M., 5 years. It was then admittted in open court of both sides that the following letters dated March 28th, 1872,

April 2d, 1872, & April 9th, 1872, were written by A. O. Douglass and W. F. Douglass, the uncles of the plaintiffs, and on their behalf, to Greene and Lucas, at Memphis, in the words and figures following, to wit:

AUBURN, ARK., *March* 29, 1872.

Messrs. GREENE & LUCAS, Ag'ts Knickerbocker Life Ins. Co., Memphis, Tenn.:

D'R SIRS: My brother-in-law, Dr. S. H. Pendleton, died on the 26th inst. In looking over his papers to-day, I am pleased to
41 see that he has a policy in your Co. for $10,000, with receipts from the home office (countersigned by yourselves) up to 18th July, 1872. While I know you will deeply regret the untimely death of your friend, I must congratulate your office upon the prestige this will give you. During Dr. P.'s illness his house was crowded with friends from Pine Bluff to Napoleon, and more than one hundred sorrowing friends followed him to his last resting place. "Requiescat in pace."

Please advise me as to what steps are necessary to be taken in the premises, and believe me sincerely your friend,

A. O. DOUGLASS.

I should like an agency, if only local; think it would pay us both; of course you know I am with the house of Moses Greenwood & Son, and travelling most of my time; one more budget would not be in my way, and if I made nothing it would cost you nothing to try me. So write me. O.

42 *Letter G. & L.*

OFFICE OF MISSISSIPPI VALLEY BRANCH OF THE KNICKERBOKER LIFE INSURANCE COMPANY. OFFICE NO. 18 KNICKERBOCKER BUILDING, MADISON ST., MEMPHIS. GREENE & LUCAS, *Managers.*

MEMPHIS, TENN., *April* 2*d*, 1872.

A. O. DOUGLASS, Esq., Auburn, Ark.:

DEAR SIR: Yours of the 28th ult., informing us of the death of Doct. Pendleton, is rec'd. We regret to learn the sad news and desire to express our unaffected sympathy for his bereaved family. We, as individuals, regret too that the provision you suppose he had made against death was abandoned by him. The policy of insurance you refer to became forfeited on the 14th Octo., 1871, by the failure on his part to pay the stipulated premium. The premium on the policy fell due July 14, 1871, at which time we took his draft on Moses Greenwood & Son, of N. O., dated July 14, '71, at 3 mo., in lieu of the cash then due, *conditioned* that the failure to pay the
43 draft would forfeit the policy.

Greenwood & Son refused to accept the draft and refused to pay at maturity, which facts were duly communicated to Doct. Pendleton, who promised from time to time to pay it, but did not.

When he was in Memphis last fall we urged upon him the importance of reviving the policy, which he promised to do, and made with our examiner an appointment to be re-examined (as is required in cases of forfeited policies) which he did not keep, but left the city, going to N. Cor., Va. On his return home some weeks later, we met him and again discussed the matter with the same result. He went home without making payment. These are the facts, and by reference to receipt you refer to, you will find that the draft for $325 is there mentioned and that the receipt was a conditional one. When the Doctor was here the writer called with him on the Southern Life Insurance Co., in which Co. he held a policy, forfeited for non-
44 payment like ours, and discussed with the Co. the subject of reviving it. We are not informed whether he did so. Only one annual premium (the first) was paid to us by the Doct., which payment left the policy in force to July 14th, 1871. We note your remarks in reference to an agency, and shall be pleased to have your co-operation. Where will letter reach you? This case is but one of hundreds of a similar character occurring under our observation and in our office; and we regret it on account of our high regard for so elegant and worthy a gentleman as was Doct. Pendleton, as well as for his family and yourself.

Yours truly, GREENE & LUCAS, *M'g'rs.*

AUBURN, LINCOLN CO., ARKS., *April* 2, 1872.

45 Messrs. GREEN & LUCAS, Memphis.

SIRS: I write to announce to you the death of Dr. Sam'l H. Pendleton, of menegetis, on the 26th ult. I find among his papers policy No. 2346 in your company, the "Knickerbocker." The receipts show premiums paid up to 14th July, 1872. I hope you will aid the beneficiaries of this policy in obtaining promptly the amount thus fortunately secured to them. I write at the request of his children, my relatives, and will await your reply before taking the necessary legal steps to prove their claim in accordance with the instructions you may send.

Very truly, W. F. DOUGLASS.

AUBURN, LINCOLN CO., ARKS., *April* 9, 1872.

Messrs. GREENE & LUCAS:

SIRS: I wrote you some days since in regard to policy No. 2346 on the life of Dr. S. H. Pendleton, but before hearing from
46 you have been shown a letter written my brother, A. O. Douglass, on same subject, and am surprised to learn that you deny validity of the claim under this policy, on the grounds of failure of Dr. P. or his merchants to meet at maturity his draft given in payment of second premium, but suppose your opinion is based on misapprehension of the character of receipt given when that draft was received. The renewal recipt is *not conditional*, but is in full for so many (three hundred and sixty-four $\frac{60}{100}$) dollars and signed by the

president and secretary and by yourselves. The failure of Dr. P. to meet his draft at maturity does not invalidate the claim of the beneficiaries while they hold a receipt for so many dollars paid. I hope when these facts are made evident to you that there will be no hesitancy on your part to adjustment of this policy.

Very truly, W. F. DOUGLASS.

47 I send copy of receipt from printed and as filled up, the receipt being given to Pleasant H. Pendleton, who is eldest son and one of the beneficiaries. D.

OFFICE OF MISSISSIPPI VALLEY BRANCH OF THE KNICKERBOCKER LIFE INSURANCE COMPANY. OFFICE NO. 18 KNICKERBOCKER BUILDING, MADISON ST., MEMPHIS. GREENE & LUCAS, *Managers*.

MEMPHIS, TENN., *April* 15, 1872.

W. F. DOUGLASS, Esq., Auburn, Arks.

DEAR SIR: Yours of the 9th inst. is rec'd. We were in error in referring to the receipt in our last touching Doct. Pendleton's policy. The conditions named are a part of the policy and a part of the obligation based upon it. The policy provides that any omission to pay any indebtedness at maturity shall cause it to be void, and Dr. P.'s draft contains the same clause and makes special mention

48 of the policy. We inclose copy of the clause referred to in the policy and quote the contract in the draft as follows: "for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity," &c.

The laws governing life policies provide, and the Supreme Court of the U. S. have confirmed decisions of lower courts, that either the assured party or the beneficiary may make the contract, and that the failure of either to make good his undertaking vitiates it. Your claim is simply one made without any *consideration* on your part to sustain it. The premium was not paid, and consequently the contract became void. If we were to consider claims of this class, the Co. or no Co. would exist two years, and thus those who complied with their obligations would be sacrificed to satisfy the demands of those who did not.

49 As individuals we regret that the Doct. should have permitted his policy to lapse, but we did everything in our power to have him revive it, as our correspondence and his own letters in our possession abundantly show, not to mention his last conversations and promises to ourselves and the gentlemen in charge of the policy department in our office. We are simply the agents of the Co., acting under its directions. As soon as the obligation of Doct. P. went unpaid we sent it to the Co. and the policy was cancelled. There is no discretion left us in such cases as this one, which are of frequent occurrence. In fact we can cite you to two hundred instances like it.

Yours truly, GREENE & LUCAS.

Plaintiffs then introduced evidence tending to show that said W. F. Douglass, the guardian of the plaintiffs, placed the policy
50 of insurance and other papers relating thereto in the charge of Kendall Smith, requesting him to present them at the office of Greene & Lucas, in Memphis, and collect the insurance money, and that said Smith on April 22, 1872, presented said policy and papers to Greene & Lucas at their office in Memphis and demanded payment, which they refused, claiming that the policy was forfeited on account of the non-payment of the draft on Moses Greenwood & Co. of N. O., given by S. H. Pendleton in part payment of the second year's premium.

Plaintiffs next introduced evidence tending to show that Greene & Lucas were managers "of the Mississippi Valley Branch office of the Knickerbocker Life Insurance Company," and kept their office at Memphis, Tennessee; that the "Mississippi Valley Branch office" at Memphis had a Memphis medical board and a Memphis board of directors; that Greene & Lucas were intrusted by the company with blank policies signed by the proper officers of the company, and
51 were authorized to accept risks, arrange the terms of contracts, issue policies in connection therewith without consultation with the company; that they were authorized to and were in the habit of furnishing blanks for making proofs of death, and giving information thereabout to applicants and to collect and give receipts for premiums on policies issued by them; that the application of S. H. Pendleton for the policy sued on was taken by an agent of Greene & Lucas at Auburn, Ark., and forwarded to Greene & Lucas at Memphis, and was accepted by Greene & Lucas and the policy written out by them or their clerk, J. L. Goodloe, and issued by them without the company's home office being consulted in any way about it; that Greene & Lucas at and before the issuance of the policy sued on were so authorized to act for the company in a territory or district so called that embraced parts of Tennessee, Mississippi, Arkansas and Alabama, with main office in Memphis, Tenn. There-
52 upon plaintiffs rested their case.

And thereupon defendant moved the court to direct a nonsuit to be entered against plaintiffs, which motion was by the court overruled; to which ruling defendant duly excepted at the time.

Thereupon defendant offered evidence, when plaintiffs objected to defendant being allowed to introduce any evidence whatever, upon the ground that defendant's motion to the court to direct a nonsuit closed the case upon the proof, and that further proof on behalf of defendant was inadmissible, which motion of plaintiffs was by the court overruled, and defendant allowed to introduce its evidence; to which ruling plaintiffs at the time duly excepted.

The defendant then read a stipulation, as follows:

It is hereby stipulated that in the draft for $325, dated Auburn, Ark., July 14, 1871, drawn in the name of S. H. Pendleton on
53 Moses Greenwood & Co., New Orleans, La., payable "three

one-fourth months after date," without grace, "to the order of the Knickerbocker Life Insurance Company made exhibit A to deposition of A. Luria, that the signature S. H. Pendleton to the said draft is the genuine signature of the S. H. Pendleton whose life was insured by policy No. 2346 of the said company, reserving all objections as to the competency and relevancy of that fact and the said draft being offered or used in evidence on the trial of the said cause.

This January 24, 1880.

HUMES & POSTON,
Att'ys for Plaintiffs.
E. L. BELCHER,
For Defendant.

54 *Exhibit A.—A. Luria.*

Draft.

The defendant then read a paper called a draft, and marked D 2,

{ Contract Stamp. Stamped. } $325.00, 8 | 6, 29 | 71, Auburn, Ark., July 14th, 1871. Three (¼) months after date, without grace, pay to the order of the Knickerbocker Life Insurance Co. three hundred twenty-five dollars, value received, for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity. | 45432.

To S. H. PENDLETON.

MOSES GREENWOOD & SON, New Orleans, La.

[Written on left side]: Miss. Valley Branch Knickerbocker Life Ins. Co.; S. B. Clarke & Co., managers; Knickerbocker B'dg, 18 Madison St., Memphis, Tenn.; due Oct. 14.

[Endorsed]: (No. 37266; Union & Planters' Bank, Memphis, Tenn.;) Greene & Lucas, managers; pay A. Luria, Esq., cash'r, or order, for collection on a'ct Union and Planters' Bank of Memphis, Tenn.; S. P. Read, cashier; no advice; refused. acc't; pay A. Luria, Esq., cash'r, or order, on ac. Union & Planters' Bank, Memphis, Tenn.; S. P. Read, cashier.

55 The defendant then introduced and read the depositions of A. Luria and Charles Santana.

Deposition of A. Luria.

1st. First interrogatory. State your name, age, residence, and occupation. What was your position in July and October, 1871?

1st. In answer to first interrogatory he says: My name is Abraham Luria, my age is forty-six years, my occupation is that of cashier of the Louisiana National Bank of New Orleans; I held the same position in July and October, 1871.

2d. Second interrogatory. Look at the paper here shown you; make it Exhibit A to your deposition; state what you know about it; whether of your own knowledge or from the bank books. Look at all the signatures and endorsements on back of said paper, and state whether you know or not in whose handwriting made, and when you state by whom made, and what positions such parties occupied at the time.

56 2d. In answer to the second interrogatory he says: I have examined the draft hereto annexed marked Exhibit A. According to the endorsements I recognize the writing of S. P. Read, cashier of the Union and Planters' Bank, Memphis, Tenn.; the endorsement of Greene & Lucas, managers, is unknown to me; the paper was received by the Louisiana National Bank through regular course for acceptance, which was refused by Moses Greenwood & Co., the drawers, the reason for refusal being that they had no advice, as per pencil memorandum endorsed on the said draft, which is in the handwriting of Charles Santana, runner of the Louisiana National Bank at that period, who presented the said draft for acceptance. On refusal of acceptance, the said draft was returned to the Union and Planters' Bank of Memphis, Tenn., and subsequently sent back to the said Louisiana National Bank by the said Union and Planters' Bank, in their letter dated October the 3d, 1871, and returned
57 again on the fourteenth day of November, 1871, to the Union & Planters' Bank of Memphis, as requested by them, in their letters of November the 14th, 1871; this draft was received on both said occasions from the said Union and Planters' Bank with instructions "no protest."

3d. Third interrogatory. State what would be the usual course of business of your bank in 1871, in regard to the particular paper when placed in your hands for collection; I refer to your course as to presentment for acceptance and payment; when would such presentments be made?

3d. In answer to the third interrogatory he says: The usual course of presentment of paper sent for collection was, at that time, and is at present, as a general rule, to present the paper for acceptance on day of receipt, if the mail is on time, and if not on time, then the following day, and for presentment to demand payment at maturity. It is customary to wait until the close of bank hours, to see if
58 parties make payment, and if payment is not made in cases of this kind, where protest is waived, then presentment is made the following day, being the day following the maturity. We have on frequent occasions presented papers on the day of maturity, but cannot positively say it was done in this case.

4th. Fourth interrogatory. What was the commercial credit of Moses Greenwood & Sons or Co. in 1871, and what is it now?

4th. In answer to the fourth interrogatory he says: I cannot positively say what was their commercial standing in 1871; the firm is now out of existence.

5th. Fifth interrogatory. In regard to the course of business of your bank, do you mean to say that where drafts are not payable at your bank, but at some other designated place of business, you wait until the day after the maturity thereof for presentment for payment, or do you not refer to paper payable at your bank? How is
59 this as to the custom of your bank now and in 1871?

5th. In answer to the fifth interrogatory he says: The custom is, all paper sent for collection, the parties on whom drawn are served with a notice of the maturity; and where protest is waived, the presentment for demand of payment is generally made the day following maturity, but frequently the presentment is made on maturity; whether on this particular case it was presented on the day of maturity or not I cannot say; this is the custom in our bank now, and was so in 1871.

6th. Sixth interrogatory. From your knowledge of banking business, as conducted in New Orleans, do you know whether the course pursued by your bank is generally followed by the other banks in New Orleans?

6th. In answer to the sixth interrogatory he says: Yes, I think it is generally observed by the other banks.

7th. Seventh interrogatory. From your examination of the endorsements upon the draft, Exhibit "A," in connection with
60 your knowledge of the course of business of the Louisiana National Bank, as stated by you, would you say whether or no said paper has been presented for acceptance and payment as other commercial paper sent to you for collection through your corresponding banks?

7th. In answer to the seventh interrogatory he says: Yes, it was presented for acceptance and for payment, as in all similar cases paper sent to us for collection, which is the custom on the part of the Louisiana National Bank in giving prompt attention to all business intrusted to its care.

8th. Eighth interrogatory. Was the said draft ever paid or not to your knowledge?

8th. In answer to the eighth interrogatory he says: It has no evidence of payment by a stamp used by said Louisiana National Bank when payment is made. I do not know of any payment of this draft.

61 Cross-interrogatories:

1st. First cross-interrogatory. Did Moses Greenwood & Co., the drawers of this paper, have a regular business office in the city of New Orleans, La., from July 14, 1871, to November 17, 1871?

1st. In answer to the first cross-interrogatory he says: Yes.

2d. Second cross-interrogatory. State what entry as to maturity of the said draft was made in the collection-book of the Louisiana National Bank?

2d. In answer to the second cross-interrogatory he says: The ma-

turity of the said draft, as entered on the books of the Louisiana National Bank, was the 14th-17th October, 1871, the three days added being the days of grace, according to the laws of Louisiana.

3d. Third cross-interrogatory. Do you know of your own knowledge that said draft was presented for either acceptance or payment?

3d. In answer to the third cross-interrogatory he says: Yes, for both, from the fact that the rules of the bank made it necessary, in the ordinary course of business, to present both for acceptance and payment.

62

4th. Fourth cross-interrogatory. Did you in person make presentment of said draft for either acceptance or payment, or were you present when either of said presentments were made?

4th. In answer to the fourth cross-interrogatory he says: No, for the reason that as cashier of the bank it is not my duty to present drafts either for acceptance or payment.

5th. Fifth cross-interrogatory. Are you sure that in the year 1871 it was the custom of your said bank to give notice to the drawers of time drafts held by you for collection, of the maturity of the same, whether accepted or not?

5th. In answer to the fifth cross-interrogatory he says: Yes, it was the custom of my bank.

6th. Sixth cross-interrogatory. Did your said bank have the said draft protested at all?

6th. In answer to the sixth cross-interrogatory he says: I think not, from the instructions received from the said Union and Planters' Bank of Memphis.

63

7th. Seventh cross-interrogatory. Why did your bank hold this paper which matured on the 17th of October, 1871, until the 17th of November, 1871, before returning it to the Union and Planters' Bank, Memphis?

7th. In answer to the seventh cross-interrogatory he says: I cannot say positively for what reason, not having the correspondence before me; my impression, however, is that protest being waived, and the demand for its payment having been made, it is quite likely that M. Greenwood & Co. may have requested it held until they could receive advice from the parties; however, it was retained with the expectation of collecting until the 17th November, 1871, when it was returned by instructions of the Union and Planters' Bank of Memphis in their letter dated November 14, 1871.

8th. Eighth cross-interrogatory. Was there in the period of time from the 14th of July, 1871, and 17th November, 1871, two firms in the city of New Orleans, one of which by the name of Moses Greenwood & Son, and the other by the name of Moses Greenwood & Co.

64

8th. In answer to the eighth cross-interrogatory he says: My impression is that at that period the firm was Moses Greenwood & Son, and I don't believe that there was any under the name of Moses Greenwood & Co. And further on deponent says naught.

A. LURIA.

Deposition of Charles Santana.

1st. First interrogatory. What is your name, residence, age and occupation; what position did you occupy in the months of July and October, 1871; what is the position of runner in the Louisiana Nation Bank of New Orleans?

Answer. My name is Charles Santana, I reside in New Orleans, am thirty-four years old; I am note clerk of the Louisiana National Bank of New Orleans at present. In the months of July and October, 1871, I was runner of the said bank; in fact I was runner of said bank during the whole of the year eighteen hundred and
65 seventy-one. The position of runner was at that time, and is now, that of collector for the bank.

2d. Second interrogatory. Please examine the paper here shown to you, which is Exhibit A in the deposition of A. Luria; have you ever seen it before? What connection did you have with it? State in full all that you know about said paper.

Answer. I have seen it before; I had it for the purpose of presenting it for acceptance, which was refused, as per pencil memorandum on the back of it, which is in my handwriting, namely, "no advice; refused acc't."

3d. Third interrogatory. Have you examined the books of the bank; and can you state what was done with said draft, and upon what date?

Answer. I have examined the book of the bank. The draft was received and presented for acceptance on the 29th day of September, 1871, to the best of my knowledge; as I see from the entries on the book of the bank, the same was refused and the draft was re-
66 turned on the thirtieth of September, 1871, by the Louisiana National Bank to the Union & Planters' Bank of Memphis. It was again received by the Louisiana National Bank on the 5th of October, 1871, and returned, as requested by the Union & Planters' Bank of Memphis, on November the 17, 1871, to the said Union & Planters' Bank of Memphis. According to our books the draft was received by us in both said instances with instructions not to have the same protested.

4th. Fourth interrogatory. If the draft was received on the 5th of October, 1871, for the second time, as stated by you, what would have been the usual course of business for your bank to pursue, in that instance, after the said receipt?

Answer. I cannot state what the usual course was at that time, as I did not hold a position in the bank that enabled me to know; I was not note clerk of the bank at that time.

67 Cross-examination:

1st. First ×-interrogatory. Examine pencil memorandum on back of said draft, namely, "M. Greenwood & Son, 325, 14–17 Oct., and state in whose handwriting the same is, if you know?

Answer. To the best of my knowledge and belief it is in the hand-

writing of W. A. Cunningham, then and now the receiving teller of the Louisiana National Bank of New Orleans.

2d. Second ×-interrogatory. In the entries of said draft on the collection book of the Louisiana National Bank, what date is given for the maturity of the said draft?

Answer. On the collection book the draft is entered as dated July 14, 1871, at three months after date.

3d. Third ×-interrogatory. From the memorandum on the said draft, made by your receiving teller as to its maturity, if presented for payment at maturity, on what day would it have been done?

68 Answer. Had it been presented for payment at maturity, as per memorandum of maturity on the back of the draft, it would have been presented on the 17th of October, 1871.

4th. Fourth ×-interrogatory. Did the Louisiana National Bank have the said draft protested at all?

Answer. Not to my knowledge.

5th. Fifth ×-interrogatory. What was the reason for the Louisiana National Bank holding said draft until November 7th, 1871, when it matured in October?

Answer. As I was not note clerk of the bank at that time, I know not.

6th. Sixth ×-interrogatory. In the absence of instructions to the contrary, was it not the usual custom with the Louisiana National Bank to return unpaid paper on the day following maturity, where protest was waived?

Answer. It is the custom to do so since I am note clerk of the bank.

69 Re-examination:

1st Interrogatory. Do you know what particular instructions were given in regard to this piece of paper?

Answer. I do not know anything about the instructions excepting what I have said before.

And further on deponent says naught.

CHAS. SANTANA.

When the deposition of A. Luria was offered in evidence, plaintiffs objected to his answers to questions Nos. 3, 5, 6 of the direct examination as being incompetent and irrelevant in proving the custom of the Louisiana National Bank in regard to presentment of paper for acceptance and payment, which objection was overruled by the court and said answers admitted in evidence; to which ruling plaintiffs then and there duly excepted.

The defendant withdrew the 5th plea filed, and the clerk need not copy the same, or any testimony thereto.

The defendant then introduced as a witness Colton Greene, one of

the firm of Greene & Lucas, whose testimony tended to prove
70 as follows, viz.:

When Greene & Lucas forwarded the $325 draft to New Orleans both times for acceptance and payment they instructed that no protest should be made.

On the 20th of November, 1871, the draft was returned by said last named bank to the Union and Planters' Bank of Memphis, pursuant to its request. On or about the 3rd day of October, 1871, the defendant's agents wrote Pendleton, by mail, of the non-acceptance of the draft, and on or about the 20th day of November, 1871, they again wrote him by letter of the non-payment of the draft, which letters were regularly mailed on those days. In the latter part of November, or early in December, Pendleton called upon said agents at Memphis and stated that the reason he did not answer their
71 letters in reference to the draft was that he expected soon to come to Memphis, and that he was much surprised that Greenwood & Co. did not pay the draft, but that they were now prepared to pay it, and he thereupon exhibited to said agents the letter hereto annexed, marked Exhibit D. The agents then stated to Pendleton that as the policy had lapsed by reason of non-payment of the draft, it would be necessary in order to reopen the same that he should be re-examined. He thereupon promised to call again, but never did, and died on the 26th day of March, 1872.

The dealings of the defendant in reference to the issue of said policy and the payments of premiums thereon were solely with the said S. H. Pendleton.

Defendants here rested their case. Thereupon plaintiffs introduced in evidence the deposition of Moses Greenwood, in
72 words and figures following, to wit: [By request of plaintiffs and without objection from defendants, clerk will here copy said deposition, omitting caption, certificate, and formalities, giving only questions, answers, and exhibits.]

Deposition of Greenwood.

Qu. 1. State your name, age, residence, and occupation.

To the first interrogatory: My name is Moses Greenwood; I am 71 years old, past; I live in New Orleans, and my occupation is that of a retired cotton factor and commission merchant.

Qu. 2. State what your occupation, and where and in what firm, if any, during the year 1871, and how long before that year had you been in that firm, business, and place?

To the second interrogatory: I was a commission merchant and cotton factor in the firm of Moses Greenwood & Son, in the
73 city of New Orleans, in 1871, and had been continuously since the fall of 1865 in said firm, business, and place.

Qu. 3. State whether or not you were acquainted with Dr. Samuel

H. Pendleton, of Arkansas county, Arkansas; how long did you know him?

To the third interrogatory: I was personally acquainted with Dr. Samuel H. Pendleton of Arkansas Co., Arkansas, for 4 or 5 years previous to 1871.

Qu. 4. If you have said that you were a member of the firm of Moses Greenwood & Sons, of New Orleans, Louisiana, during the year of 1871, then state how long you were a member of that firm, what business was the said firm engaged in, what business transactions, if any, were had between the said Dr. Pendleton and the said firm?

To the fourth interrogatory: I had been a member of said firm since September, 1865. The business of my firm was that of
74 cotton factors and commission merchants. The firm had business transactions with Dr. S. H. Pendleton, as was usual between factors and planters.

Qu. 5. If you should say that the said Dr. Pendleton had business transactions with the said firm, then say during what years, the nature of the dealings between him and the firm.

To the fifth interrogatory: My firm had business transactions with Dr. S. H. Pendleton during the years 1869, 1870, and 1871. The nature of that business was furnishing supplies for the plantation and family, or money, and selling the crops of cotton of said plantation, to reimburse the amount of supplies and money advanced.

Qu. 6. State what, if any, arrangement or agreement the said Dr. S. H. Pendleton had with the said firm to advance him money from time to time, to be afterwards paid back to the firm out of his crops, and state what arrangement, if any, of this kind he had with
75 them during the year 1871, and previous to July 14, 1871.

To the sixth interrogatory: The business arrangement and understanding between my firm and Dr. Pendleton was that the firm would advance as was necessary or required for the plantation and family supplies and money. The amount thus advanced to be refunded and paid by the sales of the cotton crops. The supplies were shipped as ordered, and the money paid on his drafts or remitted as he instructed.

Qu. 7. If you have said that there was an agreement or arrangement between him and the firm for the latter to advance him money from time to time to be afterwards paid back out of his crops, then state how in the usual course of dealing these advances were made by sending him the money, paying his drafts on the firm, or in what way?

To the seventh interrogatory: I have already answered in
76 the last interrogatory how and in what manner the supplies were furnished and the money paid.

Qu. 9. State what, if any, ground there was for the said Dr. Pendleton to believe on July 14, 1871, that his draft on your firm for $325 to $400 would be honored; state the facts; what arrangement

was there without regard, what had been the previous course of dealing between your firm and him in like matters?

To the ninth interrogatory: As my firm had furnished supplies and paid cash on his drafts, or remitted as instructed, for 3 years, he had good reason to believe that his draft for $325 as dated July 14, 1871, would be honored.

Qu. 10. What, if any, crops or other property did your firm receive from the said Dr. Pendleton than for his account during the year 1871, and what, if any, crops or other property for his account prior to Oct. 17, 1871? And state values of the said crops or
77 other property.

To tenth interrogatory: In answer to this interrogatory, I attach hereto a detailed statement of facts from the books of my firm, from 1869 to November 17, 1871, which includes all the cotton and credits transacted with Dr. Pendleton during that time, said statement being marked A.

Ex. A.

S. H. PENDLETON, Esq.,
In account current with MOSES GREENWOOD & SON.

1869.		
May 27.	To remittance to him by A. O. Douglass	$300 00
July 6.	To Ella Pendleton's account	99 32
July 8.	To paid draft to A. O. Douglass	123 00
July 8.	To interest as per account rendered.	1 21
July 8.	To balance carried down	44 07
		$567 60

1869.	Credits.	
June 4.	By sale of 2 bales cotton	$205 24
July 6.	" " 4 "	362 36
		$567 60

78 S. H. PENDLETON
In account with MOSES GREENWOOD AND SON.

1869.		
July 15.	To paid his draft to his order	$700 00
Aug. 4.	" H. B. & Co.	300 00
Aug. 17.	" W. H. Childress	100 00
Aug. 26.	" his draft to his order	75 00
Aug. 27.	" accepted d'ft So. Ins. Co., due Nov. 18, '69.	225 64
Sept. 7.	" " Toof, Philips & Co., Nov. 1, '69.	249 91
Oct. 4.	" paid his draft to S. B. Guidon.	50 00
Oct. 12.	" " " W. D. Connell	230 00
Nov. 16.	" Ellis Goobar's ac't to date	312 81
Nov. 27.	" d'ft to S. O. B. N., Ft. Gibson	80 33
Nov. 29.	" " Little Rock M'f'g Co	171 75

Nov. 30.	To paid d'ft to S. H. Tucker		100 00
Nov. 30.	" " " Steam'r Dardanell		73 05
Dec. 4.	" " " " Ft. Gibson		102 26
Dec. 4.	" " " C. K. Smith		100 00
Dec. 6.	" " " John Thompson		3,064 42
Dec. 16.	" " " St'r Mary Boyd		71 25
Dec. 24.	" commissions and int. as rendered		84 89
Dec. 24.	" F. D. Goshard's acc't		303 28
Dec. 24.	" John Strand's acc't		95 37
			$6,489 96

Credits.

1869.			
July 6.	By this amount due as per acc't		$44 07
Nov. 8.	" sale 11 bales cotton		1,147 29
Nov. 26.	" 17 "		1,448 23
Dec. 7.	" 17 "		1,687 73
Dec. 8.	" 5 "		505 87
Dec. 24.	" balance carried to new acc't		1,656 77
			$6,489 96

79 S. H. PENDLETON

In account current with MOSES GREENWOOD & SON.

1869.			
Dec. 24.	To balance per acc't rendered		$1,656 77
Dec. 27.	" d'ft to order John Thompson		325 00
1870.			
Jan'y 6.	" " A. Vacars		200 00
Jan'y 13.	" Robt. Hubbard's ac't		45 36
Jan'y 14.	" Samphe, Mitchell & D.		100 00
Jan'y 27.	" John Roach		35 00
Jan'y 31.	" invoice of bagging		205 99
Jan'y 31.	" paid freight on same		21 20
Feb'y 7.	" d'ft paid to Lewis Watson		30 11
Feb'y 10.	" " W. F. Douglass		102 00
Feb'y 12.	" " Dr. C. M. Taylor		50 00
Feb'y 12.	" " St'r Dardanell		34 00
Feb'y 16.	" " Cole & Co		50 00
Feb'y 23.	" " W. W. Johnes		66 00
Feb'y 24.	" " Bohlen, Huse & Co		60 00
Feb'y 24.	" " Wm. Lewis		40 00
Feb'y 25.	" " John Browne		57 50
M'ch 3.	" " John Thompson		203 02
M'ch 4.	" " Lavender, Harper & Co		706 19
M'ch 4.	" " paid him		100 00
M'ch 5.	" " 12 bbls. flour, $78 cash to him.		278 00
M'ch 7.	" " Steam'r W. A. Caldwell		100 00
M'ch 8.	" " invoice of groceries		409 66

M'ch 8.	To d'ft paid d'ft A. O. Douglass		300 00
M'ch 29.	" " St'r Arkansas		25 00
April 1.	" remitted Pleasant Pendleton ⅜ p. ct		200 75
April 1.	" " Mrs. E. G. Cannon, $150, ⅜ p. ct.		150 00

80

April 2.	To d'ft of G. Mayer & Bro.		140 60
April 6.	" M. & Ark & Pt. Co.		35 15
April 7.	" Steam'r Allen		33 50
April 9.	" A. O. Douglass		109 25
April 14.	" J. B. Sumner		100 00
April 14.	" com's and interest as rendered		90 15
May 4.	Paid stamps on note		80
			6,061 56

Credits.

1870.			
Jan'y 5.	By sale 14 bales of cotton		$1,407 77
M'ch 21.	" 28 " "		2,050 00
M'ch 21.	" from J. B. Summers, 4 b. c.		295 52
April 3.	" 9 bales cotton		699 00
May 4.	" draft Dick Jones		65 00
May 4.	To balance due this day		1,547 06
			6,061 56

Settled by note for $1,547.06, due Jan'y 7, '71.

81 S. H. PENDLETON, Esq.,
In account current with MOSES GREENWOOD & SON.

1870.			
May 6.	To paid draft to Steamer T. K. Allen		$116 59
May 11.	" invoice 2 bbls. mess pork.		64 67
May 13.	" d'ft Steamer Henry Frank.		280 00
June 2.	" " Jno. D. Adams		210 00
June 3.	" invoice cider, claret, and ale		43 22
June 14.	" Steamer Allen		50 68
June 16.	" " Cilesto		60 75
June 28.	" " Mary Boyd		22 75
July 12.	" " "		72 17
July 23.	" Lucin W. Cox.		70 95
Aug. 6.	" Pleasant Pendleton		155 00
Aug. 8.	" Brooks, Neely & Co		45 00
Sept. 2.	" invoice of groceries		95 20
Sept. 21.	" d'ft to Jno. Thompson.		118 17
Oct. 5.	" " S. H. Tucker		30 00
Nov. 1.	" invoice bagging, pork, &c		366 92

Nov. 2.	To paid d'ft A. Vaccaro & Co	50	00
Nov. 18.	" " Knickerbocker Life Ins. Co., due 29th	364	00
Nov. 22.	" " Steamer Hamilton	41	50
Nov. 28.	" telegram Pendleton S. & S	1	75
Dec. 1.	" d'ft to L. W. Watson, due Feb. 23, '71.	575	60
Dec. 1.	" freight bill St'r Arkansas	17	00
Dec. 14.	" d'ft Steamer Hamilton.	123	25
1871.			
Jan'y 18.	" remitted A. H. Baker $200, ½ p. ct	199	75
Jan'y 18.	" Mrs. E. J. Common $100, ½ p. ct.	99	84
M'ch 4.	" d'ft L. W. Watson	56	25
M'ch 9.	" charges in B | L Steamer Seminole.	130	00

82

M'ch 11.	Paid to d'ft to himself	300	00
M'ch 13.	" " Jno. Thompson	50	00
M'ch 15.	" " St'r Clearborn	32	41
M'ch 20.	" " Shoemaker $50; pro int. $5.02	55	02
M'ch 24.	" " St'r Celeste.	68	50
Ap'l 20.	" " " Pindalls.	50	00
Ap'l 20.	" " C. M. Taylor & Co	33	00
May 9.	To paid him on acc. 2 b. c., T. B	75	00
May 11.	" "	100	00
May 11.	" invoice bagging, twine, and pork	131	99
May 11.	" paid charges B | L St'r Clarksville.	170	00
May 18.	" remitted A. H. Baker $150 a pr'm 56 c	150	56
May 18.	" " Pleasant Pendleton $100 3-p.r. 37c.	100	37
May 18.	" " Mrs. E. F. Conaran $150, ⅜ p. c. 57.	150	57
July 12.	" p'd d'ft Davis, Lavander & Co	22	00
Aug. 4.	" invoice flour, sides, sugar, rice, &c	57	80
Aug. 12.	" paid d'ft Knickerbocker Life Ins. Co.	44	50
Aug. 21.	" " K. Smith	20	00
Sept. 6.	" invoice bagging, ties, &c.	199	68
Sept. 13.	" paid d'ft to A. O. Douglass	30	00
Sept. 14.	" " St'r Fort Gibson	135	00
Oct. 16.	" interest $311.75; com's $54.38	365	83
		5,664	06

Credits.

1870.		
Nov. 22.	By sale of 9 bales cotton	$550 56
Dec. 22.	" 8 "	442 93
Dec. 27.	" balance net proceeds 4 b. c. A. O. Douglass.	37 09
1871.		
Jan'y 26.	" sales 20 bales cotton	1,089 86
Feb'y 17.	" 6 "	327 95

M'ch 7.	By transfer from C. Rainey		20 00
Ap'l 19.	" from Lewis & Donelly on d'ft on $100		45 15

83

May 18.	" from Lewis & Donally on d'ft of $100		48 78
May 18.	" sale of 26 bales cotton		1,165 96
May 18.	" 5 "		220 51
May 18.	" 4 "		189 82
June 14.	" 14 "		881 53
Sept. 8.	" 1 "		66 72
Oct. 7.	" 1 "		74 68
			5,161 54
Oct. 7.	Balance due this day		$502 52

E. & O. E.,
New Orleans.

S. H. PENDLETON
In account with MOSES GREENWOOD & SON.

1871.			
Oct. 16.	To am't due as per acc. rendered		$502 52
Oct. 20.	" paid Virginia Wilkins		60 00
Oct. 20.	" " Steamer Dardanell		140 00
Nov. 31.	" " telegraph dis		1 35
Nov. 23.	" " "		3 45
1872.			
Jan'y 9.	" " d'ft to S. Meyer & Bro		64 25
Feb'y 1.	" " interest		61 06
			832 63

Credits.

1871.			
Nov. 17.	By sale of 1 bale cotton		$66 12
Nov. 17.	" balance this day to new ac't		766 51
			832 63
Nov. 17.	Balance bro't down and due this day		$766 51

Qu. 11. If you have said that the said Dr. Pendleton sent his crops to your firm for sale prior to the year 1871, then state for how
84 many years, and the value as near as you can of his crop of each previous year.

To the eleventh interrogatory: In answer to this interrogatory I reply that this is fully answered by the hereto annexed statement (marked A) to the answer to the 10th interrogatory.

Qu. 12. State what, if any, had been the course of dealing between your firm and the said Dr. Pendleton prior to July 14, '71, in regard to your firm accepting and paying his drafts on the firm when the latter had no funds or property belonging to him.

To the twelfth interrogatory: It had been customary with my firm to accept and pay drafts of Dr. Pendleton when he had no money, cotton, or other property in the hands of the firm, or in their possession, as is fully shown in the accounts attached hereto and
85 made a part of my answer to the tenth interrogatory.

Qu. 13. State how stood the credit of the said Dr. Pendleton with your said firm prior to and on the 14th of July, 1871.

To the thirteenth interrogatory: Dr. Pendleton's credit was good with my firm on the 14th of July, 1871, and had been for three years previously.

Qu. 14. If you have said that there was an agreement or arrangement between your firm and the said Dr. Pendleton for the firm to advance him money during the year 1871, then state what, if any, security was given or agreed to be given to said firm therefor.

To the fourteenth interrogatory: Dr. Pendleton having met his obligations to the satisfaction of my firm, and promising to ship his crops of cotton to us, the firm agreed that supplies would be furnished and money paid as before. My firm held no security
86 for his indebtedness to us other than the assurance that the crops of cotton would be shipped to my firm.

Cross-interrogatories by defendant:

1. Are you related by consanguinity or affinity to any of the parties to this suit; if so, how?

To the first cross-interrogatory: I am not.

2. Have you, or any of your firm, now or as existing 1871, any interest in this law-suit, or the policy of insurance upon which it is based; if so, what? Explain fully.

To the second cross-interrogatory: None.

3. Will you please examine your books and papers and refresh your memory about a draft as follows:

"$325.00. Auburn, Arks., July 14, 1871. Three months after date, without grace, pay to the order of the Knickerbocker Life Insurance Company three hundred twenty-five dollars. Value
87 received for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity.

"(Signed) S. H. PENDLETON.

"To Messrs. GREENWOOD & SON,

"*New Orleans, La.*"

To the third cross-interrogatory: I have examined the books of Moses Greenwood & Son, and find no entry of the acceptance or payment of said draft. I have no recollection of said draft other than what is shown by the books and correspondence, a copy of

which said correspondence is hereto annexed, marked "B." The letter of Dr. Pendleton of the 27th of October, 1871, (referred to and answer in our letter of the 4th of November, 1871, hereto annexed) cannot be found. The above is all the correspondence I find in relation to that draft.

Ex. "B"—Copy.

NEW ORLEANS, *September* 29, '71.

Dr. S. H. PENDLETON, Auburn, Arkansas:

DEAR SIR: Yours of the 21st advising draft for lumber is to hand. By the Indiana we have one bale for your account. We find
88 it of good quality for your country. Your draft for life policy (some $330) due 14th next month, was presented this day for acceptance. Not finding any advice of it, we requested them to hold till we got an answer from you. Please write at once if you want it paid. I returned last night from a trip of six weeks to Virginia and the North. Health good, market dull, prices some lower.

Truly yours,

(Signed) MOSES GREENWOOD & SON.

Exhibit B.—Copy.

NEW ORLEANS, *Nov.* 4, '71.

Dr. S. H. PENDLETON, Auburn, Arks.

DEAR SIR: Yours of the 27th ult. received. Will pay that insurance note when presented, as you request. This is the first advice we have had about it. Cotton market not as good by fully ¼ to ½c. as it was, and no one can tell whether it will improve or
89 not. The prices are so much better than last year that we in favor of shipping and selling at once, and thus stop the interest and make things comfortable.

Respectfully yours,

(Signed) MOSES GREENWOOD & SON.

4. Was said draft paid by you; and if so, why not?

This was not answered.

5. Please examine your books, and tell me when Dr. S. H. Pendleton's ac. first began to be against him.

To the fifth cross-interrogatory: I have examined the books of my firm and found that his account first began to be against him on the 27th day of May, 1869, as stated in the account marked "A" in the direct interrogatory.

6. How did his account stand 14 July, 1871? Give me the exact figures for 12 months prior and following such date.

To the sixth cross-interrogatory: The accounts marked A
90 give an exact statement of how his accounts stood in 1871 and previous.

7. Please examine your letter book—see if you had any correspondence with Dr. S. H. Pendleton, and if you find a letter or copy of a letter in regard to the non-payment of said draft of July 14, 1871, produce and file it as an exhibit to your deposition.

To the seventh cross-interrogatory: I have examined the letter books and correspondence had with Dr. Pendleton in 1871 in regard to said draft, and refer to the letters hereto annexed, marked "B," which is all I have on the subject.

8. State, under oath, whether you examined books of Mess. Greenwood & Sons, N. O., La., as requested in 5th & 6th cross-interrogatories, in person, or by your clerk; if by your clerk, give me his name and address.

To the eighth interrogatory: I have examined them in person.

9. If after the non-payment of the draft of July 14, '71, of
91 Dr. S. H. Pendleton—if such was the fact—can you tell me from your books if any friend was sent to your house to meet the payment of the same? If so, when and how and by what means do you know that the same was sent to you for that special purpose? If you have any writing regarding this matter, file it with your deposition.

To the ninth cross-interrogatory: We received no money or funds of any description for that special purpose, to my knowledge. The accounts marked A and the correspondence marked B, hereto annexed, give me all the information I have on the subject.

And thereupon he signs his name.

MOSES GREENWOOD.

Thereupon plaintiffs introduced in evidence Pleasant H. Pendleton, one of plaintiffs, who testified in open court, and the deposition of Thomas E. Douglass, the evidence of said witnesses tending to prove that during several years before the death of Dr. Samuel H.
92 Pendleton and up to the time of his death he was a cotton planter; owned and cultivated a farm near Auburn, Arkansas, on which his usual crops of cotton amounted to 100 to 125 bales; that for several years before his death the firm of Moses Greenwood & Sons, of New Orleans, were his cotton factors and commission merchants; that he sent his crops to that firm and they advanced him money and supplies by paying his drafts or remittances to him; that his drafts on the firm had been honored, unless the draft in question be an exception.

Both parties then rested, and the defendant, through its counsel, thereupon requested the court to direct the jury to find a verdict in favor of the defendant on the ground that the policy sued on was not in force at the time of the death of the person whose life was insured thereby. The court refused to give such direction, and
93 the defendant then and there duly excepted to such refusal. The defendant then requested the court to instruct the jury

that upon the undisputed facts appearing from the evidence the defendant is entitled to a verdict.

The court refused to give such instruction, and the defendant then and there duly excepted to such refusal.

The defendant then requested the court to charge the jury that the reception of this draft for $325 by the defendant on account of premium upon the drawer or the plaintiffs the duty of making absolute provision for its payment at maturity at the place of payment, and if he or they failed to do so the defendant was under no obligation to present the same for payment.

The court refused so to charge, and the defendant then and there duly excepted to such refusal.

The defendant then further requested the court to charge the jury
94 that the refusal of the drawees to accept the draft when presented for acceptance relieved the defendant from its obligation, if any existed, to present the same for payment in the absence of further notice that the same would be paid when due.

The court refused so to charge, and the defendant then and there duly excepted to such refusal.

The defendant then further requested the court to charge the jury that if they believed from the evidence either that the drawer had not placed any funds in the hands of the drawees to meet the draft at its maturity, or that it was in fact presented for payment at or after its maturity, the policy became void and of no effect upon the death of the party whose life was insured thereby and the plaintiffs are not entitled to recover. The court refused so to charge, and the defendant then and there duly excepted to such refusal.

Thereupon plaintiffs requested the court to give the follow-
95 ing instructions, as marked Nos. 1 and 2, to the jury:

1. If the jury find from the evidence that the managers at Memphis of the Mississippi Valley Branch office of defendant company in settlement of the second year's insurance took from Dr. S. H. Pendleton $44.50 in cash and his draft for $325 on his commission merchants, Moses Greenwood & Co., at New Orleans, La., maturing October 14, 1871, and that said managers were authorized expressly or by the usual course of dealing between them and their company to so extend the time of payment of premiums, and thereupon delivered to Pendleton the renewal receipt offered in evidence, and that Pendleton at the time of drawing said draft had reasonable grounds to expect that his said draft would be paid by the drawees, at maturity, and that drawees had at the maturity of the said draft an established and known business office in the city of New Orleans,
96 La., and that the said draft was not presented at maturity to the drawees for payment, then without considering other matters the jury will find for the plaintiffs.

Which said instruction the judge refused to give; to which ruling the plaintiffs at the time duly excepted.

2. If the jury find from the evidence that from the Spring 1869 to the drawing of said draft on July 14, 1871, the said Moses Greenwood & Son were the cotton factors and commission merchants for the said S. H. Pendleton; that during the said time it was agreed between them that said firm would advance him money on his drafts and otherwise from time to time as he needed it, and that he would send them his crops of cotton to be sold by them and the proceeds applied in payment of his indebtedness to the firm; that the course of dealing between him and the said firm during that time and
97 up to the drawing and maturity of the said draft had been in accordance with such agreement, and that during all of the said time he had drawn drafts on the said firm, and they had paid them regardless of whether they had money, effects, or property of his in their possession; that at the time of drawing said draft there was a balance of more than $208 in money to the credit of Pendleton with the said firm, then Pendleton would have reasonable grounds to expect the payment of his draft at maturity within the meaning of the foregoing instruction, which instruction the judge refused to give; to which ruling the plaintiffs at the time duly excepted.

The court thereupon charged the jury as follows:

Charge.

By the terms of this policy the obligation of the company to pay the amount of $10,000 upon the death of Dr. Pendleton ceases
98 upon the failure of the plaintiffs here to comply with a condition in the policy relied on by the defendant company, which is in the following words: "And the omission to pay the said annual premium on or before 12 o'clock noon on the day or days above designated for the payment thereof, or the failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein."

It is not necessary, as has been contended by the plaintiffs, that the company should declare a forfeiture or give notice that they claimed the benefit of this condition upon the failure to pay either the premium or any obligation given for it; the policy is self-forfeiting upon the failure to pay either the premium or any obliga-
99 tion given for it. Nor was the company bound to return the obligation upon its non-payment, or the part of the premium paid in cash, to give this clause effect. By the undisputed facts in this case it appears that on the fourteenth day of July, 1871, when the second premium fell due, Dr. Pendleton gave the Memphis managers a sight-draft for $44.50 on Greenwood & Co., of New Orleans, (which was paid in cash,) in part payment of the $364 premium due, and for the balance of $325 he gave a draft on the same house, payable three months after date, without grace. Upon secur-

ing these drafts the renewal receipt acknowledging the payment of the premium was delivered, and before the year ended Dr. Pendleton, the life assured, died. The draft also contained a statement that it was given "for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity," and
100 has never been paid. The defense of the company is that the condition for payment has been violated, and the policy ceased before the death of Pendleton. This is undoubtedly a good defense unless the law imposed some obligation on the company to perform some duty in respect to the draft which it has not performed, and the neglect of which precludes it from invoking the breach of the condition for payment as a defense. In other words, if by its own laches, and neglect of the duty assumed by it as holder of the draft, the failure to pay has occurred, or the parties have been injured, the company cannot rely on the breach of this condition as a defense. What, then, were the duties imposed on the company as the holder of this draft by the contract of the parties? The defendant company claims that it was the duty of the drawer, or the plaintiffs, to place funds in the hands of Greenwood & Co. to meet this draft at
101 its maturity, and if the proof shows there were no funds there on that day to pay it, the policy became void on non-payment of the draft, whether you find as a fact that it was presented on that day for payment or not; and certainly if you find it was so presented, I do not think this is a correct view of the law of the case or rights of the parties. This draft, according to its terms, being payable without grace, was payable on demand, at the counting-house of Greenwood and Co., in the city of New Orleans, on the fourteenth day of October, 1871. I have been inclined to think that if the draft was presented for payment on that day, at that place, and payment refused, the condition of the policy was broken; and, on the other hand, if no presentment for payment was made at that time and place, there has been no breach. The contract was that the
102 sum should be paid at a particular time and place, or the policy should be void. If the company did not have the draft there at the time of maturity the condition could not be performed, and by its fault the performance became impossible, and therefore it cannot claim a breach. But I have concluded that the true measure of the duty of the company is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed, in reference to this paper, all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any holder would be under the commercial law. On the other hand, any neglect to proceed properly in the discharge of that duty would be excused under the same circumstances as such neglect would be ex-
103 cused with any other holder, and not otherwise. The condition in the policy was a security to the company, of which it can avail itself only by showing a strict compliance with that duty, or some lawful excuse for non-compliance.

This was, in legal form and effect, a contract with the plaintiffs, the policy-holders, the children of Dr. Pendleton, to take from them the draft of a third person, negotiable in form, in payment of $325 of the premium due, secured by a stipulation that the policy should cease if the draft should not be paid at maturity. Now, what was the duty of the company and its agent? Its first duty was to fix the liability of the drawer by proper demand, protest, and notice, if it did not negotiate it by indorsement and impose that duty on some other holder. The parties from whom they took the draft,
104 the plaintiffs here, had a right to this, and it might have been very material to them to have it done. Next, the duty the company owed the drawer was to notify him promptly and legally of any failure of the drawees to accept or pay. This draft being payable three months after date, the company was under no obligation to present it for acceptance, but if it did undertake to present for acceptance it should have proceeded in all respects as if the obligation existed. There is no doubt the draft was sent forward for acceptance, presentment, and acceptance refused. The proof will show you the date of the transaction. The plaintiffs say it was not till September 29th, 1871. It was not protested for non-acceptance, the agents of the company having directed that no protest should be made, and no legal or proper notice of non-acceptance was
105 given to the drawer. This was a clear breach of duty on the part of the company, and precludes it from claiming a forfeiture of the policy unless excused, as to which I shall instruct you further on. If protest and legal notice had been given for non-acceptance, the company need not have presented for non-payment; but, not having protested the note for non-acceptance, it was its duty to present at maturity and demand payment. There is some dispute as to whether the note was presented for payment on the day of its maturity, namely, October 14th, 1871, or later, but there is no claim that it was protested for non-payment and legal notice given. The only notice was a letter from the agents, dated November 20, 1871. This was not legal notice, and the drawer was clearly discharged unless the neglect was excused. By this neglect, as well as
106 the neglect to protest and give legal notice for non-acceptance, the company precluded itself from relying on a breach of the condition in the policy. Indeed, the legal result is that the draft became payable in fact, and there was no breach of the condition unless on the facts of the case the neglect has been excused.

The only legal excuse would be want of funds in the hands of the drawees at the time of presentation; and this would not excuse if the drawer of the draft had reasonable ground to expect that his draft would be accepted and paid by the drawees. You will therefore look to the proof, and say whether the drawer had funds in the hands of the drawees to meet this draft, and if you find he did not, then you will determine whether there was reasonable expectation of acceptance of payment. In determining this question you will look

107 to the facts in proof on both sides, and determine whether there was any contract between Pendleton and Greenwood & Co. that his drafts should be accepted and paid; and if you find there was such a contract he was entitled to demand and notice. If there was no contract, but an arrangement, and you find that Pendleton was a planter and Greenwood & Co. his factors; that by the course of dealing between them they accepted and paid his drafts, advanced him money, and dealt with him so as to justify him in expecting they would accept and pay without reference to the state of the account; and if you find they paid other drafts and similar ones to this company without funds—these circumstances would show reasonable grounds of expectation to entitle him to demand and
108 notice. On the other hand, if you find that Pendleton had no contract or agreement with Greenwood & Co. to accept and pay, and that their course of dealing did not justify him in drawing without funds, or that, by the contract or course of dealing, he was required to give them notice of drafts by letters of advice, and that no such letters were sent as to this draft, he had no reasonable expectation of acceptance or payment without funds; and if you find there was no provision made to meet this draft the plaintiffs cannot recover. You will apply these instructions to the presentation for acceptance, and if you find there were neither funds, contract, or other arrangement, nor a reasonable expectation of acceptance, the failure to protest and give notice would be excused.

If this default was then excused, then it was still the duty
109 of the company to present for payment on the fourteenth day of October, 1871. If you find the draft was presented on that day, protest and notice not having been given, or if you find it was presented after that day, you will apply these instructions to that presentation also; and if you find there were no funds, and no reasonable expectation of payment, the plaintiffs cannot recover. You are to determine these questions of fact on all the proof, and say whether the default of the company has been excused by want of funds and want of reasonable expectation of acceptance or payment. As to the proof of loss not being filed, it is conceded notice of the death was given. If, when that was done, the agents of the company repudiated all liability, and informed the parties that the policy had lapsed, then no proof of loss was required by them,
110 and the failure to file it cannot alter the case. If, however, the company or its agent did not thus waive proof of loss, then this action is prematurely brought, and the plaintiffs cannot recover until 90 days after proof filed with them.

There is a clause in this policy which authorizes all unpaid premiums to be deducted. I think the inexorable logic of a verdict for the plaintiffs, on the instructions I have given you, is that the premium has been in fact paid by the taking of this draft; but that question is out of the way, by the consent of the plaintiffs, that you may deduct the draft and interest on it from any verdict in their favor.

If you find for the plaintiffs, they are entitled to interest on the policy from 90 days after date of the notice of death.

111 UNITED STATES OF AMERICA,
.....*Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November Term, A. D., 1880, at the United States Court-house, in the city of Memphis, in said district, on, to wit, the 10 day of Jan'y, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

Came again the parties by their attorneys, and thereupon came also the jury heretofore duly elected, empanelled, and sworn in this cause, who, after hearing the evidence, arguments of attorneys, and charge of the court, retired to consider of their verdict, and returned into court with their verdict, as follows: We, the jury, find for the plaintiffs for fifteen thousand one hundred and seventy-five dollars debt and interest. It is therefore ordered and adjudged by
112 the court that the plaintiffs have and recover of and from the defendant the said sum of fifteen thousand one hundred and seventy-five dollars ($15,175.00), and also the costs of suit, for all of which let execution issue. And thereupon the defendant moved the court for a new trial, which motion is reserved by the court to be considered of hereafter.

Bill of Exceptions—continued.

The defendant thereupon and then and there duly excepted
113 to the following portion of said charge, to wit: "The defendant company *company* claims that if it was the duty of the drawer or of the plaintiffs to place funds in the hands of Greenwood and Co., to meet this draft at its maturity, and if the proof shows there were no funds there on that day to pay it, the policy became void on non-payment of the draft, whether you find as a fact that it was presented on that day for payment or not; and certainly if you find that it was so presented, I do not think this is a correct view of the law."

Said defendant also then and there duly excepted to so much of the charge as instructed the jury that if the company did not have the draft at the place of payment at the time of maturity the condition could not be performed, and by its default performance thereof became impossible, and therefore the defendant could not
114 claim a breach of the conditions of the policy.

Said defendant also then and there duly excepted to so much of said charge as instructed the jury—

That the time measure of the duty of the defendant in relation to this draft is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed in relation thereto all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any holder would be under the commercial law. Said defendant then and there also duly excepted to so much of said charge as instructed the jury in substance—

That the neglect of the defendant to discharge the duty of a holder of commercial paper in reference to this draft would only be
115 excused on the same grounds as would excuse the performance of the duty of a holder of any other commercial draft.

Said defendant also then and there duly excepted to each and every part of the following portion of said charge, to wit:

"Now, what was the duty of the company and its agents? Its first duty was to fix the liability of the drawer by proper demand, protest and notice, if it did not negotiate it by endorsement and impose that duty on some other holder. The parties from whom they took this draft, the plaintiffs here, had a right to this, and it might have been very material to them to have it done. Next the duty company owed the drawer was to notify him promptly and legally of any failure of the drawers to accept or pay."

Said defendant then and there duly excepted to so much of said charge as instructed the jury—

That said draft being payable three months after date the
116 company was under no obligation to present it for acceptance, but if it did undertake to present the same for acceptance it should have proceeded in all respects as if the obligation existed.

Said defendant also then and there duly excepted to so much of said charge as instructed the jury that no legal or proper notice of non-acceptance of this draft was given to the drawer, and that not having presented the draft for non-acceptance it was its duty to present the same at maturity and demand payment. Said defendant also then and there duly excepted to each and every part of so much of said charge as instructed the jury that the letter of November 20, 1871, from defendant's agents, was not legal notice of non-payment, and the drawer was clearly discharged unless the neglect was excused, and that by this neglect as well as the neglect to pro-
117 test and give legal notice of non-acceptance the company pre cluded itself from relying on a breach of the condition in the policy, and that the draft became payment in fact, and there was no breach of the conditions unless on the facts of the case the neglect has been excused.

Said defendant also then and there duly excepted to each and every part of so much of said charge as was in the following words, to wit:

"The only legal excuse would be want of funds in the hands of the drawers at the time of presentation, and this would not excuse if the drawer of the draft had reasonable grounds to expect that this draft would be accepted and paid by the drawers. You will look therefore to the proof and say whether the drawer had funds in the hands of the drawers to meet this draft, and if you find he did
118 not, then you will determine whether there was reasonable expectation of acceptance of payment."

Said defendant also then and there duly excepted to each and every part of the following portion of said charge, to wit: "In determining this question you will look to the facts in proof on both sides and determine whether there was any contract between Pendleton and Greenwood & Co. that his drafts should be accepted and paid, and if you find there was such a contract he was entitled to demand and notice. If there was no contract, but an agreement, and you find that Pendleton was a planter and Greenwood & Co. his factors; that by the course of dealing between them they accepted and paid his drafts, advanced him money and dealt with him so as to justify him in expecting they would accept and pay without reference to the state of the account, and if you find they paid other
119 drafts and similar ones to this company without funds, these circumstances would show and would be reasonable grounds of expectation to entitle him to demand and notice.

Said defendant also then and there duly excepted to so much of said charge as instructed the jury that if the agents of the company, after receiving due notice of death, repudiated all liability and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to furnish it cannot alter the case.

The defendant moved the court for a new trial herein, which motion was by the court refused, and the defendant tenders this
120 his bill of exceptions to the ruling of the court overruling defendant's motion for a new trial, which bill of exceptions, is signed, sealed, and is made part of the record in this case.

E. S. HAMMOND, [SEAL.]
U. S. District Judge, &c.

(Endorsed:) 2144; Pleasant H. Pendleton and others *v.* Knickerbocker Life Insurance Company; Bill of Exceptions; filed May 20, 1881; Bell W. Etheridge, clerk; W. B. W. Eisiger, D. C.

121 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun

and held for its Nov. Term, A. D. 1880, at the United States Court-house, in the city of Memphis, in said district, on, to wit, the 19th day of May, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et al., Plaintiffs,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

Came the parties by their attorneys, and thereupon for good and satisfactory reasons appearing to the court, it ordered that the judgment rendered January 10, 1881, upon the verdict of that date, be set aside and for nought held, and the motion of the defendant for a new trial, after argument and full consideration by the court, is overruled, and it is therefore ordered and adjudged by the court that the plaintiffs have and recover of the defendant said sum
122 of fifteen thousand one hundred and seventy-five dollars, ($15,175.00,) the amount of the verdict aforesaid, together with interest thereon from the date said verdict was rendered, to wit, January 10, 1881, at the rate of six per cent. per annum, together with the court costs to be taxed, for all which let execution issue.

123 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1880, at the United States Court-house, in the city of Memphis, in said district, on, to wit, the 19th day of May, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et al., Plaintiffs,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

In this cause the defendant presented its bill of exceptions, and the same were signed, sealed, and made a part of the record in this case, this the 19th day of May, 1881.

124 UNITED STATES OF AMERICA,
..... *Division of the Western District of Tennessee.*

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. Term, A. D. 1880, at the United States Court-

house, in the city of Memphis, in said district, on, to wit, the 19th day of May, A. D. 1881, in the following cause, to wit:

PLEASANT H. PENDLETON et als., by next friend, Plaintiff,
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.

In this cause the court fixes the supersedeas bond to be given at the sum of twenty thousand dollars; this for the purpose of a writ of error with supersedeas; and at the request of defendant this bond may be given either in southern or eastern districts of New York; the bond to be approved by the judge of the court of such district, and to be forwarded to this court, and to be approved by the court here.

125 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States in and for the Western District of Tennessee greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said Circuit Court before you, between P. H. Pendleton, plaintiff, and The Knickerbocker Life Insurance Company is defendant, a manifest error hath happened to the great damage of the said defendant, as by complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1881, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, at Memphis, this 28th day of May, A. D. 1881, and 105 of American Independence.

BELL W. ETHERIDGE, *Clerk.*
[SEAL.] W. B. W. EISIGER, *D. C.*

(Endorsed:) No. 2144; Circuit Court of the United States, Western District of Tennessee; R. H. Pendleton et als. *v.* Knickerbocker Life Ins. Company; writ of error issued the 28 day of May, 1881; Bell W. Etheridge, Clerk; W. B. W. Eisiger, D. C.; service of the writ of error acknowledged for the defendant in error, this May 28th, 1881; Humes & Poston, atty's for plaintiff.

126 UNITED STATES OF AMERICA:

To P. H. Pendleton greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1881, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Circuit and Western District of Tennessee, wherein The Knickerbocker Life Insurance Company are plaintiffs and you are defendants in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the District Court of the United States for the Western District of Tennessee, this 28th day of May, 1881.

E. S. HAMMOND,
U. S. District Judge, &c.

WESTERN DISTRICT TENN., *Memphis Tennessee,* } *ss.*

The within-named P. H. Pendleton, being *non est inventus* on the 28th day of May, A. D. 1881, and at Memphis, Tennessee, in said district, I duly cited and admonished Humes & Poston, att'ys for said P. H. Pendleton, to be and appear as herein commanded, as will further appear by their acknowledgment hereon endorsed and made part of this my return.

M. T. WILLIAMSON,
U. S. Marshal.
By J. W. RAMSEY, *Deputy.*

(Endorsed:) No. 2144; Circuit Court of the United States, Western District of Tennessee; P. H. Pendleton et als. *v.* Knickerbocker Life Ins. Co.; Citation; filed the 28 day of May, A. D. 1881; Bell W. Etheridge, clerk; W. B. W. Eisiger, D. C.; Notice of the citation acknowledged this May 28th, 1881; Humes & Poston, att'ys for Pendleton.

127 Supreme Court of the United States.

Know all men by these presents, That we, the Knickerbocker Life Insurance Co. of New York, N. Y., and E. L. Belcher & Colton as Green sureties, are held and firmly bound unto P. H. Pendleton in the sum of two hundred and fifty dollars, to be paid to the said obligees, their executors or administrators; to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, dated this 28th day of May, 1881.

Whereas the above named Knickerbocker Life Insurance Company

of city of New York, New York, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Circuit Court of the United States for the Western District of Tennessee:

Now, therefore, the consideration of this obligation is such, that if the above named the Knickerbocker Life Insurance Company of city of New York, New York, shall prosecute this said writ of error to effect, and answer all costs and damages thereby, and shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

KNICKERBOCKER LIFE INS. CO. OF NEW YORK.
By E. L. BELCHER, *Att'y.* [SEAL.]
E. L. BELCHER. [SEAL.]
COLTON GREEN. [SEAL.]

Acknowledged before me this 28th day of May, 1881.

BELL W. ETHERIDGE, *Clerk.*
W. B. W. EISIGER, *D. C.*

128 (Endorsed:) No. 2144; Circuit Court of the United States, Western District of Tennessee; P. H. Pendleton et als. *v.* Knickerbocker Life Insurance Company; writ of error bond; to United States Supreme Court; filed the 27th day of May, A. D. 1881; Bell W. Etheridge, clerk; W. B. W. Eisiger, D. C.

129 Supreme Court of the United States.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

PLEASANT H. PENDLETON et al.
No. 2144. *vs.*
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Know all men by these presents: That we, the Knickerbocker Life Insurance Company, principal, and Richard S. Roberts and Michael N. Wiener and ..... sureties, are held and firmly bound unto Pleasant H. Pendleton, Cornelia E. Dixon (formerly Pendleton) and her husband, Charles V. Dixon, Mary E. Pendleton, and Francis M. Pendleton, plaintiffs in the above entitled cause, their executors and administrators, in the penal sum of twenty thousand dollars, lawful money of the United States of America, for the payment of which well and truly to be made we bind ourselves and
130 each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this fifth day of July, 1881.

The condition of this obligation, that whereas the above named

the Knickerbocker Life Insurance Company, defendant herein, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action in the Circuit Court of the United States for the Western District of Tennessee on the 19th day of May, 1881: Now, therefore, the condition of this obligation is such that if the above bounder the Knickerbocker Life Insurance Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail therein, then this obligation shall be void; otherwise to remain in full force and effect.

THE KNICKERBOCKER LIFE INS. CO. [L. S.]
By J. A. NICHOLS, *President.*

131 Sealed and delivered in presence of

MICHAEL N. WIENER. [SEAL.]
RICH. S. ROBERTS. [SEAL.]

STATE OF NEW YORK, }
City and County of New York, } *ss.*

I hereby certify that on this fifth day of July, 1881, before me personally appeared Richard S. Roberts and Michael N. Weiner, to me known, and known to me to be the individuals described as sureties in the foregoing instrument or obligation and who executed the same; and they severally, each for himself, acknowledged that they executed the same for the uses and purposes therein mentioned.

ADDISON BROWN,
U. S. District Judge, S. D. N. Y.

STATE OF NEW YORK, }
City and County of New York, } *ss.*

On this 5th day of July, in the year A. D. 1881, before me personally came John N. Nichols, the president of the Knickerbocker Life Insurance Company, with whom I am personally ac-
132 quainted, who being by me duly sworn did depose and say that he resided in the city of Brooklyn; that he was the president of the Knickerbocker Life Insurance Company; that he knew the corporate seal of said company; that the sealed affixed to the within instrument was such corporate seal; that it was affixed by the order of the board of directors of said company; and that he signed his name thereto by the like order as president of said company.

JOHN G. FOSTER,
Not'y Pub. Kings Co., N. Y., cert. filed in N. Y. Co.

Circuit Court of the United States for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit.

PLEASANT H. PENDLETON, CORNELIA E. DIXON (formerly Pendleton) and her husband, CHARLES V. DIXON, MARY E. PENDLETON, and FRANCIS M. PENDLETON, Def'ts in Error,
No. 2144 *vs.*
THE KNICKERBOCKER LIFE INSURANCE CO., Pl't'ff in Error.

133 Examination of sureties taken at chambers in the U. S. court-house in the city of New York, before Hon. Addison Brown, U. S. Dist. Judge for the Southern District of New York, upon a supersedeas bond given in the above-entitled cause, upon a writ of error issued out of this court to review a judgment in favor of defendants in error entered herein on the 19 day of May, 1881, and bond being executed in pursuance of an order entered herein on the 19 day of May, 1881, permitting said bond to be given in either the Southern or Eastern District of New York, and to be approved by either of the judges of the U. S. court for said district.

134 Said examination proceeds, Mess. Johnson, Canline & Deming appearing on behalf of plaintiff in error, and A. Walker Otis on behalf of defendants in error.

Richard S. Roberts, one of said sureties, being sworn, deposes and says:

Ques. 1. By Mr. Otis: Mr. Roberts, where do you reside, and where do you transact your business, and what is the nature of said business?

Ans. I reside at 328 Clinton avenue, Brooklyn, Kings county, State of New York; my place of business is at No. 96 Greene street, New York city; I am an importer and dealer in hatters' trimmings.

Q. Are you interested in the business of the plaintiff in error, the Knickerbocker Life Insurance Company, and if so, to what extent?

Ans. I am a director therein by virtue of my ownership of five shares of its stock.

Ques. Please state whether you own any real estate, and if so, its assessed value for 1880, and the encumbrances thereon, if any.

135 Ans. I own my residence, 328 Clinton ave.; it was assessed in 1880 for about $16,500, and is encumbered by one mortgage for $15,000. It was originally a five-year mortgage, and is now overdue for some years. There is no interest due thereon. There are no back taxes on said property. I also own the property No. 251 South street in New York city, assessed in 1880 for $19,000. It is encumbered by one mortgage for $20,000 due in 1885; no interest due thereon. The taxes on the property are all paid up to date. I own the south half of the block bounded by East 97th and 98th streets, Second and Third avenues, in New York city, assessed in 1880 at about $27,000, encumbered by one mortgage for $40,000 past due; no interest due thereon. The taxes are all paid

to date. I have owned this property since 1852, the South-street property since 1850, and the Clinton-ave. property since 1870.

The above is all of my real estate.

136 I own personal property as follows: I am the senior member of the firm of Roberts, Cushman & Co., dealers in and importers of hatters' goods at 96 Greene street, New York city; this firm has been in existence, under different names, for 25 years, during all of which time I have been a member thereof; the firm is perfectly solvent, and in my judgment worth half a million dollars, over and above its liabilities.

Qu. Will you please state the amount and value of your interest in said firm, and the amount of the assets and liabilities of said firm?

An. I decline to answer as to the amount and value of my interest in said firm. I will state, however, that we have recently taken an inventory. The liabilities of the firm are about $150,000, and the assets about $700,000.

137 I am surety on some small bonds in law-suits, not exceeding on all $2,500. I am not surety on any bond for the performance of official duties, and especially I am not surety for any executor, administrator or guardian at present I am not an endorser or guarantor on any commercial paper or any obligation outside of my firm's endorsement.

Examined by Mr. Johnson:

Qu. What do you regard the fair market value of the Brooklyn real estate you have mentioned, and upon what do you base your judgment?

An. $35,000. I have been offered $30,000 recently, and have declined it.

Qu. What, in your judgment, is the fair market value of the South street property you have mentioned, and on what do you base your judgment?

An. $40,000. I have recently been offered $35,000 for it, which I have refused. I regard it as worth much more than that, and do not wish to sell it.

138 Qu. What, in your judgment, is the fair market value of the Ninety-seventh street property you have mentioned, and on what do you base your judgment?

An. My price for the property is $90,000. I have recently been offered $80,000, and the offer is under consideration.

Qu. What, in your judgment, is your real estate that you have named, fairly worth in the market, over and above the incumbrances thereon?

An. At a reasonable estimate, $75,000.

Qu. Do you owe any debts personally other than your liability on these mortgages?

An. None of any consequence.

Re-direct by Mr. Otis:

Qu. Have you received any offer for the Ninety-seventh street property prior to this year?

An. Yes. I had an offer for it about 15 years ago, of $65,000. I have received no offer for it since that time, until this year—the last offer which I had for the South st. was in 1858, when
139 I was offered $34,000, but half has been built on since that time. The Brooklyn property I have not offered for sale until recently.

There has been considerable activity in New York real estate during this year, more than for several years past.

While I decline to go into details as to the business of my firm, (Roberts, Cushman & Co.,) I am entirely willing to swear that my interest in said firm is not less than one-fourth interest in same; the stock of merchandise which said firm now has on hand exceeds in cost value three hundred thousand dollars.

RICH. S. ROBERTS.

Sworn to before me this 1st day of July, 1881.

ADDISON BROWN,
U. S. Dist. Judge, S. D., N. Y.

Further examination of sureties adjourned until Tuesday,
140 July 5th, 1881, at 11 A. M.

A. WALKER OTIS,
of Counsel for Def'ts in Error.

Continuation of Examination of Sureties.

Michael N. Wienir, being duly sworn, deposes and says: I am 55 years of age; married, and reside at New Brighton, Richmond county, State of New York; I am by occupation a hotel-keeper, and at present keep the Bayview Hotel, at New Brighton; I do not owe exceeding one thousand dollars, and that is for monthly bills; I pay cash for everything I buy; I am the owner in fee of a half acre of ground at New Brighton, on which stands a four story brick and stone hotel, 50x60, also a three story brick store and dwelling, 25x50, and a two story frame building, store and dwelling, 20x30; all these buildings are insured for the aggregate sum of
141 $30,000; the assessed value of the property for 1881 is $8,000.

In 1875 I borrowed from the Mutual Life Insurance Company of New York $15,000 on this property; said mortgage has since been paid; the taxes are all paid to date on said property; the furniture and fixtures in the hotel cost in round figures about $1,000 in 1876; they are all owned by me and paid for; I also own an undivided ½ of a purchase-money mortgage for $40,000; the mortgage was originally $175,000, and has been paid down to $40,000; the mortgage *mortgage* is made by Jabez A. Boswick, and dated on

September 16, 1873, payable to John Swinborne, Stephen F. Shortland, and myself, and covers land in Richmond county, N. York, and is registered in the office of the clerk of said county about the time of its date; I also own an undivided ¼ of 150 lots 25x100, in the village of New Brighton, Richmond county, N. York, assessed in 1880 at $17,400, as one parcel; there are located thereon four houses, (3 story frame,) which cost $5,000 each in 1880, and are now rented at $500 per annum each; these 150 lots are entirely free from encumbrances, and the taxes are all paid; the four houses last named are estimated for $12,000; I have been a hotel-keeper since 1855.

I am not surety on any bond or obligation, and am not an endorser or guarantor on any commercial paper, contract, or obligation.

142 Cross-examined by Mr. Johnson:

I consider the 150 lots, with the improvements thereon, worth $150,000 to-day. My opinion is based on sales which I have recently made. I have sold 26 lots off this tract since January 1, 1880, at an average of $1,000 each.

I built the above-named hotel in 1876, at a cost of $26,000,
143 since which time I have placed $8,000 additional improvements thereon.

MICHAEL N. WEINER.

Sworn to before me, this 5th day of July, 1881.

ADDISON BROWN,
U. S. Dist. Judge.

(Endorsed:) No. 2144; Circuit Court of the United States, Western District of Tennessee; Pleasant H. Pendleton & als. *v.* Knickerbocker Life Insurance Company; bond; approval and examination of sureties on appeal to Supreme Court; approved this 5th day of July, 1881, as to form of bond and sufficiency of sureties, both parties appearing before me; Addison Brown, U. S. D. Judge; approved July 11, 1881; E. S. Hammond, U. S. Dist. Judge, &c.; filed July 11th, 1881; Bell W. Etheridge, clerk; W. B. W. Eisiger, D. C.

144 THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee.

I, Bell W. Etheridge, clerk of the Circuit Court of the United States for said District of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings in said court as the same now appears of record and upon the files in my office, in the following

cause, to wit, Pleasant H. Pendleton *et als. v.* Knickerbocker Life Insurance Company.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 24th day of August, A. D. 1881, and of the Independence of the United States the 106th year.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*

(Endorsed:) No. 2144; Circuit Court of the United States, District of West Tennessee; Pleasant H. Pendleton and others *v.* Knickerbocker Life Ins. Co.

115-339

Office Supreme Court U. S.
FILED
OCT 30 1884
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. ~~000~~. 73.

Error to the Circuit Court of the United States

FOR THE WESTERN DISTRICT OF TENNESSEE.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,

Plaintiff in Error,

against

PLEASANT H. PENDLETON, and others,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

LESLIE W. RUSSELL,

Counsel for Plaintiff in Error,

32 Nassau St., N. Y.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,
against
PLEASANT H. PENDLETON and others,
Defendants in Error.

No. ~~885.~~ 73.

Brief for Plaintiff in Error.

The action was brought in the Circuit Court of Shelby County, Tennessee, by the defendants in error to recover of the plaintiff in error the sum of $15,000 on a certain policy of insurance issued by the plaintiff in error upon the life of Samuel H. Pendleton.

The case was thereafter removed to the Circuit Court

of the United States for the Western District of Tennessee.

The policy of insurance was issued on the 14th day of July, 1870, and insured the life of Samuel H. Pendleton in the sum of $10,000 for the benefit of the defendants in error; and by its terms the sum of $364.60 was to be paid on the 14th day of July in each and every year as the annual premium thereon (Policy at p. 13).

It was further stipulated by said policy that the omission to pay the said annual premium on or before 12 o'clock noon of the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation or indebtedness (other than the annual credit or loan), for premium or interest on said policy, should then and there cause said policy to be void, *without notice to any party or parties interested therein* (p. 14).

It was further stipulated that neither the policy or any renewal receipt thereof should be valid until the *actual payment* of the premium (p. 14).

It was a further condition of the policy, upon which alone was made the covenant to pay the insurance, that due notice *and satisfactory proof of the death* of the insured should be given (p. 13).

At the end of the first year, on July 14, 1871, the assured was not ready to pay his premium, and he gave to the agents of the company two drafts on Moses Greenwood & Son, of New Orleans; one a sight draft of $44.50, and the other in the words following:

"$325.00. AUBURN, ARK., July 14, 1871.

"Three months after date, without grace, pay to the "order of the Knickerbocker Life Insurance Co., three "hundred twenty-five dollars, value received, *for pre-*

"*mium on policy No.* 2346, *which policy shall become*
"*void if this draft is not paid at maturity.*

"S. H. PENDLETON.

"To MOSES GREENWOOD & SON,
"New Orleans, La."

Thereupon the agents gave him a renewal receipt for the year (fols. 39, 54).

This draft the agents deposited in a Memphis bank for collection. By its terms it became due October 14, 1871. It was by the bank forwarded to a New Orleans bank, its correspondent, for collection. In both cases the banks received the draft with instructions of "no protest" (fols. 57, 70).

On September 29, 1871, the draft was received at New Orleans, and the same day presented to the drawee for acceptance, which was refused (fols. 54, 56, 65, 88). It was thereupon returned to the Memphis bank, and by that bank again sent to the New Orleans bank on October 3, (fols. 57-66), with the same instructions of "no protest" (fols. 57, 70).

Thus far no conflict as to the facts exists. As to whether actual demand for payment was made of Greenwood on October 14, or whether thereafter some doubt has been assumed. The cashier of the New Orleans bank swears that it was their custom in 1871, to present such paper for payment when due (fols. 58, 59, 60, 62), though he, of course, did not attend to those matters in person; that he therefore knew it was presented for payment as well as for acceptance (fol. 62); that it was sometimes customary to wait till the close of banking hours, to see if parties make payment, and if payment is not made in cases of this kind, where protest is waived, then presentment is made the following day; that they frequently presented for payment on the day of maturity, but can not positively say it was done in this case (fol.

58); that it was always their custom to give drawers of time drafts held for collection notice of the maturity of the same, whether accepted or not (fol. 62). Not a particle of affirmative evidence that it was not presented was given. The drawee alone was asked in regard to it (fol. 87), and he only said that his books showed nothing in regard to either its acceptance or payment, and he remembered nothing about it.

In any event, the draft was not paid at maturity, and on November 17th was called for by the Memphis Bank and returned to it.

On September 29th, the day of his declining to accept the draft, the drawee wrote to the drawer of his refusal to accept, and said he had no advices about it, and if the drawer wanted it paid, to notify him; and on October 3, as soon as the draft came back to Memphis, the agents of the company also wrote him thereof (fols. 88, 70). This, it will be noted, was still from 10 to 15 days before the maturity of the draft. To the letter of the agents he paid no attention whatever; that of the drawee he acknowledged *October* 27, four weeks after it was sent (fol. 87), and he then, *thirteen days after the maturity of the draft*, requested the drawee to pay it. The drawee acknowledged this letter on November 5, and said, "I will now pay it; this is the first advice I have had about it" (fol. 89).

The draft being returned to Memphis, November 17, on its receipt on November 20, the agents again wrote Pendleton of its non-payment (fol. 70). He called and said the reason he had not answered their letters was that he expected to sooner be in Memphis, and that he was surprised Greenwood did not pay the draft, but they were now prepared to pay it, showing their letter of November 5 to that effect. He was told by the agents that, as the policy had lapsed by non-payment of the draft, it would be necessary for him to be re-

examined to re-open the policy. He thereupon promised to call again, but did not, undoubtedly caring no longer to pay the premium or carry the insurance (fols. 70, 71). He died March 26, 1872, and the draft was never paid.

At the time of drawing the draft in July, 1871, the drawer had a small amount of funds in the hands of the drawee, but less than the draft of $325. This amount, however, he withdrew before the maturity of the draft, and neither at the time of the presentment for acceptance on September 29, nor at its maturity on October 14, did he have any funds in the drawee's hands, but on the contrary, his account was overdrawn about $500.

After the death of the assured a brother-in-law of his wrote the agents of the occurrence. They replied that the policy had lapsed, and that Pendleton so understood. No proofs of loss were furnished, but suit at once brought.

The case was tried in the Circuit Court before a jury. The learned judge held that because the agents recognized no liability at all, proofs of loss were waived; that the company did not give *legal* notice to the drawer of the non-acceptance and non-payment of the draft, and was precluded from relying on a breach of the condition of the policy, and that the duty of the company was measured by the general rules governing a holder of commercial paper, and having presented the draft for acceptance was bound to protest the same or the policy was continued in force.

The jury rendered a verdict for $15,175 in favor of the defendants in error. A motion for a new trial was made and denied on May 19, 1881, and on May 28, 1881, a writ of error was duly issued removing the case into this Court, where the record was filed October 12, 1881.

No opinion on the motion for a new trial was handed down.

ASSIGNMENTS OF ERROR.

(See fols. 52, 92 to 97, and 113 to 120.)

1. The Court erred in denying the motion for a nonsuit (fol. 52).

2. The Court erred in refusing the request to direct the jury to find a verdict for defendant (fol. 92-3).

3. The Court erred in refusing to instruct the jury that the refusal of the said drawee to accept said draft relieved the plaintiff in error from any obligation to present the same for payment in the absence of further notice that the same would be paid when due (fol. 93).

4. The Court erred in refusing to instruct the jury that if they believed from the evidence either that the drawer had not placed in the hands of the drawee funds to meet the said draft at maturity, or it was presented for payment at or after its maturity, and was not paid, the policy of insurance became void (fol. 94).

5. The Court erred in charging the jury that it was not the duty of the drawer to place funds in the hands of said drawee to meet the said draft at maturity, and that the policy did not become void on the non-payment of said draft, there being no funds to pay it, whether presented for payment or not (fol. 113).

6. The Court erred in charging the jury that if the plaintiff in error did not have the said draft at the place of payment at the time of maturity, it could not claim a breach of the conditions of the policy (fol. 113).

7. The Court erred in charging the jury that the duty of the plaintiff in error in relation to this draft is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed in relation thereto all the duties devolving on a holder of it taken for any other consider-

ation and were obliged to proceed with it as any other holder would be under the commercial law (fol. 114).

8. The Court erred in charging the jury that the neglect of the plaintiff in error to discharge the duty of a holder of commercial paper in reference to this draft would only be excused on the same grounds as would excuse the performance of the duty by the holder of any other commercial paper (fol. 114).

9. The Court erred in charging the jury that it was the duty of said plaintiff in error to fix the liability of the drawer of said draft by demand of payment, protest and notice thereof, or to impose that duty on some other; and that said plaintiff in error was obligated to notify the drawer promptly and legally of any failure of the drawee *to accept or pay* (fol. 115).

10. The Court erred in charging the jury that although it was not necessary to present said draft for acceptance, yet that having presented it for acceptance the plaintiff in error was obliged to proceed in all respects as though the obligation to present for acceptance had existed (fol. 115).

11.—The Court erred in charging the jury that no legal or proper notice of non-acceptance was given to the assured, and that not having presented the draft for non-acceptance it was its duty to present the same at maturity, and demand payment (fol. 116).

12. The Court erred in charging the jury that the letter of November 20, 1871, from defendant's agents, was not legal notice of non-payment, and that the assured was clearly discharged unless the neglect was excused, and that by this neglect and the neglect to protest and give legal notice of non-acceptance, the company precluded itself from relying on a breach of the condition in the policy; and that the draft became payment in fact, and there was no breach of the conditions unless, on the facts of the case, the neglect has been excused (fol. 116).

13. The Court erred in charging the jury that the only legal excuse would be want of funds in the hands of the drawee at the time of presentation, and this would not excuse if the drawer had reasonable ground to expect an acceptance and payment (fol. 117).

14. The Court erred in charging the jury that if there was no contract between Greenwood & Co., and the assured by which they were to accept his drafts, but was an arrangement and course of dealing between them by which they paid his drafts and advanced him money without reference to the state of the account, and had paid other similar drafts to this without funds, these circumstances would show and would be reasonable grounds of expectation to entitle him to demand and notice (fol. 118).

15. The Court erred in charging the jury that if the agents of the company, after receiving due notice of death, repudiated all liability and informed the parties that the policy had lapsed, then no proofs of loss were required (fol. 119).

ARGUMENT.

FIRST.

The action could not be maintained without the furnishing of proofs of loss to the company.

A. The contract of the company was to pay the sum insured "within three months after due notice *and* "*satisfactory proof of the death*—during the continu- "ation and before the termination of this policy—of the "said party whose life is hereby insured" (policy, p. 13).

No proof of loss was made of any kind. The learned Judge charged the jury as follows: "As to the proof "of loss not being filed, it is conceded notice of the "death was given. If, when that was done, the agents "of the company repudiated all liability and informed "the parties that the policy had lapsed, then no proof "of loss was required of them, and the failure to file it "cannot alter the case" (fol. 110).

This charge was duly excepted to and it was erroneous. This condition as to furnishing notice and proofs of loss is one of the terms of the policy, which is the only contract between the parties. Its purpose and propriety are obvious. It is that the insurer may be able to act intelligently, and to form some estimate of its rights and liabilities before it is necessary to pay this large sum of money. Some proof must be exhibited. It was not called upon to send $10,000 to Arkansas on receiving this letter from a stranger or be precluded from saying a suit is premature.

Nor is a *notice* alone sufficient. The two are distinct. By the terms of the contract the two are required conjunctively. Proof, in addition to notice, means some form of evidence recognized by the law.

O'Reilly *vs.* Guardian Mutual L. I. Co., 60 N. Y., 169.

The proofs are a condition precedent to maintaining the action.

Mason *vs.* Harvey, 8 Exch., 819.
Taylor *vs.* Ætna Life Ins. Co., 13 Gray, 434.
Davis *vs.* Niagara Ins. Co., 49 Maine, 282.
Hincken *vs.* Mutual Ins. Co., 50 N. Y., 657.

What sort of proof was required need not be considered. None at all was furnished.

B. There was no question of waiver of the condition

to go to the jury. The facts were not disputed. The letters were produced, and that was all. The question of waiver was for the Court.

C. There was no waiver by the agents. Their letters are set out at folios 42 and 47. They stated that the policy had been abandoned by the assured and the contract broken, setting forth the facts in full.

Conceding that the company might, in certain cases, be estopped from asserting that the contract was not fulfilled, and might be held to waive performance by its own acts, if they misled the assured, yet this is not such a case.

Cases of waiver of proofs of loss may readily be found in the books. But they are uniformly cases where attempted proofs were furnished and not objected to, whereby a waiver of defects in them occurred; or cases where they were received too late, but in silence, whereby the company was estopped from demanding strict performance as to time.

The distinction is plain. Here *no proofs at all* were made. On being informed that Pendleton was dead the company said the policy is not now in force. It was not bound to specify all its defences in answer to those letters on peril of losing those not specified.

Columbian Ins. Co. *vs.* Lawrence, 2 Peters, 25, 53.
Brink *vs.* Hanover Ins. Co., 70 N. Y., 593.
Diehl *vs.* Mutual Ins. Co., 58 Penn., 452.
Patrick *vs.* Ins. Co., 43 N. H., 621.
Beatty *vs.* Ins. Co., 66 Penn., 9.
Bell *vs.* Lycoming Ins. Co., 67 N. Y., 274.
Devens *vs.* M. & T. Ins. Co., 83 N. Y., 169.

In the BRINK case the Court below left it to the jury to predicate a waiver of the proofs of loss upon the refusal of the company to pay the loss on the ground of

fraud. The Court of Appeals held the charge erroneous and reversed the judgment on this ground alone.

In the BELL case the policy had been cancelled by the company without the knowledge of the assured. He was required to give notice of loss forthwith. He gave notice of loss to the local agents, and then learned that he had to give it to the secretary, which he did. The secretary then claimed he had no risk on the property at all, and said nothing about the notice being too late. The trial judge ruled that the notice was too late, but left it to the jury to say if there was a waiver. The Court of Appeals held this to be error, and that by taking the position that no liability existed the secretary waived no other defense.

And this ruling is particularly correct in a case, like the one at the bar, where no brief time was lfmited for the furnishing the proofs of loss. If the company had misled the insured, whereby his time had expired, the Court would refuse its sanction to the defence, that they came too late. Here a summons came in place of proofs. The condition precedent was not fulfilled, and the action should have been dismissed, until the proofs were furnished.

SECOND.

The contract was broken by the assured, and was not in force at the time of his death.

The terms of the contract were as follows (page 14):

"And the omission to pay the said annual premium "on or before 12 o'clock noon on the day or days "above designated for the payment thereof, or failure "to pay at maturity any note, obligation or indebted-"ness (other than the annual credit or loan) for pre-"mium or interest hereon, shall then and thereafter

"cause this policy to be void, without notice to any "party or parties interested herein." And further: "Neither this policy of insurance, or renewal receipts "of the same, will be valid until the actual payment "of the premium."

The draft itself (fol. 54) contained upon its face the contract, that the policy of insurance should become void, if the draft was not paid at maturity.

The draft was never paid, nor was there an offer to pay it. The insurance terminated October 14, 1871, more than five months before the death of the assured.

1. This draft, being payable a certain number of days after date, no presentment for acceptance, before maturity, was necessary.

Edwards on Bills, 387.
Story on Bills, § 231.
Bank of Washington *vs.* Triplett, 1 Peters, 25.
Townsley *vs.* Sumrall, 2 Peters, 170.

2. Nor was it necessary to protest the draft for non-acceptance. It was drawn in Arkansas, delivered in Tennessee, and payable in Louisiana. If the laws and particular statute of any one State determine the rights of the drawer, it is by the Laws of Arkansas, where his contract was made.

Slocum *vs.* Pomery, 6 Cranch, 221.
Bank of U. S. *vs.* U. S., 2 How. (U. S.), 711.

The Arkansas Statutes only confirm the law merchant in regard to negotiable paper, and no special duties are imposed thereby.

Buckner *vs.* R. E. Bank, 5 Ark., 536.

But the questions in this case (adopting for the mo-

ment the theory of the Court below, that the duty of the company in regard to this draft was just the same as that of any holder of commercial paper) are to be decided by the law merchant, which is the law, not of a single State, but of the commercial world. On such commercial law will the decisions of this Court be placed.

Swift *vs.* Tyson, 16 Peters, 1.
Watson *vs.* Torpley, 18 How. (U. S.), 519.

This draft was unnecessarily presented to the drawee before maturity, obviously to obtain the additional security of his acceptance. It was refused. The parties stood in precisely the same position as before. The drawer, Pendleton, was still the primary and the only debtor.

And right here appears the first inconsistency in the instruction of the Court that the rules of commercial paper govern this case. If this were an ordinary negotiable instrument, the holder might, upon acceptance being refused, immediately sue the maker, without waiting for the maturity of the bill, for the contract of the drawer is not only that the bill will be paid, but that the drawee will accept it, if so desired. Would the learned Court likewise have held that the company might, on September 29th, have protested this instrument for non-acceptance, and proceeded against Pendleton on the debt, and that thereby his insurance contract was terminated? No; it would have said you could do that on an ordinary draft, but here is a special contract in addition that he is to have till October 14th to keep his insurance good.

The draft on September 29th was in the hands of the New Orleans bank, endorsed to it by the Memphis bank with protest waived; this latter bank had likewise received it from Green & Lucas, with protest waived. No other endorsers existed. No one was en-

titled to a formal protest. If such protest was not made, was the drawer discharged, not only from liability on the instrument itself, but from the debt?

A protest is a formal declaration of dishonor, of which fact a notary gives a certificate, which is legal evidence in a Court of law. The protest certificate need not be served; only a notice that his bill is dishonored. If the same fact is otherwise shown to him, it is equally availing.

It is apparent that the thing of benefit to the drawer is the *notice*. This is radically different from the protest. He got two notices, *one from the drawee himself*. This he not only receives but acknowledges it, and afterwards makes a request that the draft be paid.

And it is submittod with confidence that no reported decision can be found holding that in case a bill, which need not be presented for acceptance before maturity, is so presented, and notice at once given to the drawer, who is the primary debtor, that he is discharged not only from liability on the draft, but from his own debt, because no formal protest was made.

In the connection the learned judge charged the jury (fol. 105): "it was not protested for non-acceptance, "the agents of the company having directed that no "protest should be made; and *no legal or proper notice* "of non-acceptance was given to the drawer. This was "a clear breach of duty on the part of the company, "and precluded it from claiming a forfeiture of the "policy, unless excused, as to which I shall instruct "you further on."

They never were instructed further on so as to remove the erroneous idea here conveyed.

They were charged unqualifiedly that no "legal or proper notice" of non-acceptance was given. In fact, deceased was notified in writing by the drawee on that very day, and by the holders four days later, as soon as they as they learned of the dishonor at Memphis.

It is well settled that no particular form of notice is necessary, and that it need not even be in writing.

Cuyler *vs.* Stevens, 4 Wend., 566.
Boyd's Admrs. *vs.* Savings Bank, 15 Grat., 501.
Cayuga Bank *vs.* Warden, 1 N. Y., 413.
Mills *vs.* Bank of U. S., 11 Wheaton, 431.

That he plainly understood it is shown by his subsequently requesting the drawee to pay it. And where the notice is received its mode of transmission is immaterial.

Hyslop *vs.* Jones, 3 McLean, 69.
Bank U. S. *vs.* Corcoran, 2 Peters, 121.

The notice, then, subserves all needs of his. It puts him upon his inquiry. For all he knows the formal protest at New Orleans was made. He may not assume it was not; it would not have been sent to him. It makes no difference to him whether it was or not; he is the debtor; it would have been otherwise if accepted; it was not.

This Court has laid down the rule that *protest* for non-acceptance need not be shown in proceedings for non-payment.

Brown *vs.* Barry, 3 Dallas, 365.
Clarke *vs.* Russell, 3 Dallas, 415.

And this should obtain *a fortiori* where the draft, like the present, is for the *accommodation of the drawer*. No legal liability on the part of Greenwood to accept existed. It was, at best, a case of expectation of acceptance. The drawee had not promised to accept it. When it was drawn he had not funds of the drawer in his hands to meet it. Furthermore, the small amount then there had been withdrawn before it was presented for acceptance. No rights of the drawer were invaded

or threatened by that refusal to accept. He still had sixteen days to arrange for the payment of his debt, and he was so notified. Instead of that he waited nearly a month, and then, thirteen days after he had broken his contract, he asked the drawee if he would pay the draft.

Again, no protest for non-acceptance was necessary, for the reason that the instrument was not negotiable. It contained upon its face, in addition to the order for the payment of the funds, a separate and distinct contract between the parties, by which, in the event of its non-payment, another and previous contract between the same parties was *ipso facto* to terminate without further notice. It was never designed as a negotiable instrument with the usual incidents thereto. It was to be retained by the company as the evidence of this agreement in regard to the policy. It was never negotiated by the company, but merely delivered to its agent for collection. Such contracts have never been held to be governed by the rules of commercial law.

The cases cited by some writers as authority for the broad statement that when a bill is unnecessarily presented for acceptance and the same refused, the same proceedings must be taken as though the demand had been necessary, are not sound in principle if meant to apply to the drawer; and they will be found to be cases arising *between the agent for collection and the payee and endorser himself*. Those cases say if the bill is forwarded and received before maturity a proper regard for his principal's interests will call upon the agent to present it at once and protest it if dishonored. Thus; if the company had not waived protest, it could have complained of the failure of its agent the same as any principal can look to its agent for negligence. But that is for the company's benefit. It has nothing to do with the duties of the principal debtor.

THIRD.

As to the alleged obligation to present for payment two questions arise:

1st. Was it presented for payment?

2d. If no special demand was on that day made of Greenwood, was the company precluded from saying the insurance contract was terminated by the non-payment of the draft according to agreement?

1. There is no presumed finding of the jury that payment was not demanded on that day. The question was not submitted to them. Under the charge of the learned Judge a verdict for the plaintiffs indicated no such finding.

It was the duty of the Court to have assumed that it was presented for payment. The testimony of the cashier showed that it was the invariable custom of the bank, but no record was kept where protest was waived. It was the custom also to always serve notice of maturity; and he says this draft was presented both for acceptance and payment. No one denied it. Greenwood only said he had no record of it. Neither did he of the presentation for acceptance and his refusal, which it is conceded, occurred. This is the only scrap of evidence offered to rebut the presumption that the bank did its duty. The cashier says further that he then held it till November in the hope of making a collection. The conclusion is irresistible that demand was made.

It was not paid. The assured broke his contract that it should be paid at maturity, and thereby the policy terminated.

2. But in any event, a demand for payment on that day was not necessary.

A. The draft was solely one for the accommodation

of the drawer. The accommodation had been declined. This he knew sixteen days before it was due. Yet he makes no provision whatever for its payment, and does not even ask the drawee to pay it until thirteen days after its maturity. The draft having been dishonored for non-acceptance, and notice thereof given to the drawer, a demand for payment as against him was unnecessary.

Walker *vs.* Stetson, 19 Ohio St., 400.
Exeter Bank *vs.* Gordon, 8 N. H., 66.
Plato *vs.* Reynolds, 27 N. Y., 586.
Watson *vs.* Tarpley, 18 How. (U. S.), 517.

B. He had no funds in the drawee's hands. The amount there when he drew the draft in July, which was less than the draft, he had in the meantime withdrawn, evincing the intent to prevent payment. In such case no demand is necessary, at least unless he was justified in expecting it would be paid.

Dickins *vs.* Beal, 10 Peters, 572.

And in this case his right to expect its payment was expressly and conclusively negatived by the drawee's refusal, unless he received advices, which advices the drawer neglected to send. On the contrary, he well knew it would not be paid. The cases holding demand for payment should be made are those where an acceptance had been perfected, and thus some one else had become the primary debtor, and those where the person held entitled to it was the accommodation party and not the debtor endeavoring thus to pay his own debt. In cases like that at bar the further demand is not essential.

Terry *vs.* Parker, 6 Adol. & Ellis, 502.
Rhett *vs.* Poe, 2 How. (U. S.), 457.
Valk *vs.* Simons, 4 Mason, 113.

C. No injury is shown to him by the non-presentment for payment. It is not like the case where the drawee became insolvent. No question of that sort arises. Greenwood was just as ready to pay afterward as then and no more so. He demanded advices, but he did not get them on October 14th.

And if it be said that injury is presumed it is answered that the presumption is not conclusive. We make a *prima facie* case of no injury by showing want of funds. And in this case we go further and show beyond the shadow of a doubt that no injury did or could occur; and that is shown conclusively by the fact that it would not have been paid in any event, no matter how strenuously demanded. The letter of the drawee of September 29th says: "I have no advices; if I am to pay I must be notified." None were sent until October 27th. The drawee then says, under date of November 4th: "Yours of the 27th ult. received. I will now pay that insurance note when presented; *this is the first advice I have had in regard to it.*" He says himself that he would not have paid it on October 14th.

In this connection the learned Judge charged the jury as follows (fol. 105): "If *protest and legal notice* had been given for non-acceptance, the company need not have presented for non-payment; but not having protested the note for non-acceptance it was its duty to present at maturity and demand payment. There is some dispute as to whether the note was presented for non-payment on the day of its maturity, namely, October 14th, 1871, or later, but there is no claim that it was protested for non-payment, and *legal* notice given. The only notice was a letter from the agents, dated November 20, This *was not legal notice, and the drawer was clearly discharged unless the neglect was excused. By this neglect as well as the neglect to protest and*

give legal notice of non-acceptance the company precluded itself from relying on a breach of the condition in the policy." And again at fol. 102: "If the company did not have the draft there at the time of maturity the condition could not be performed, and by its fault the performance became impossible, and therefore it can not claim a breach."

The most radical error in the charge, as above quoted, lies in the direction to the jury that by *non-protest and legal notice of non-payment* the company precluded itself from the benefit of the contract. How or why what occurred after October 14th, 1871, in regard to this draft had the least thing whatever to do with this case is not apparent. If the company was not in fault up to that time was it bound to continue any longer to waive its premium? Was it bound any further to try to fasten liability on any one on this draft? Was not the contract broken by the assured by non-payment before noon of that day, if the company had not been up to that date negligent? Could it not let the draft go and treat the insurance premium as not paid?

It is shown that no neglect on the part of the company occurred in regard to the acceptance, for,

A. Being payable a certain number of days after date, presentment for acceptance was unnecessary.

B. Formal protest for non-acceptance was therefore not necessary.

C. Formal protest for non-acceptance of bills of exchange is not essential by the law merchant of the United States, as against the accommodation drawer, being himself the primary and the only debtor.

D. The *notice* is the thing, if any thing, essential, and that was given.

E. The instrument was non-negotiable on its face, and was certainly never intended as a negotiable com-

mercial draft by the parties, but was their new and separate contract.

Nor is any neglect shown on the part of the company on October 14th, in regard to demand for payment, for

A. It was, as a matter of fact, presented.

B. Formal demand was unnecessary as against an accommodation drawer, thus trying to raise funds for himself.

C. It had not been accepted.

D. It had been dishonored and notice thereof given to and received by the drawer.

E. He had no funds in the drawee's hands, had withdrawn the small balance previously there, and had provided no fund to meet the draft.

F. No possible use of the demand appears, for he was the primary and only debtor; no endorsers are in the case; he had no predecessor to look to.

G. No injury to him is shown.

H. It appears conclusively that no injury did occur, and that presentment would have been unavailing, as Greenwood under no circumstances would have that day paid it.

If the company had given protest and notice of non-payment it would not only have been unnecessary, but dangerous. It might have been said that thereby it elected to continue the liability of the drawer *on the draft* and thereby further waived the premium.

Not being under the slightest obligation to further continue the insurance after October 14th, it does not appear what further concern it had about that draft except as a contract. If there had been some intermediate endorsers, perhaps it should have notified them that they might have looked out to save themselves as against

the preceeding endorsers. No such question is presented.

But, indeed, they do inform the assured that his draft was not paid. He says and does nothing. After an interval he comes and says he had not written earlier because he had been expecting to come in person; he expresses grief that the draft was not yet paid, and wishes it sent back again, because, he says, they have now promised to pay it, and he shows the letter to that effect. The company at this time, the first chance they have had to get hold of him, inform him at once that they have treated the contract as broken by him since October 14th, and for renewed insurance a new examination will be necessary.

There was no concealment, nothing misleading; the company stood on its legal rights and its agreement. He promises to come and be examined; but even that agreement he breaks, as he has every other one. He never paid the premium; he never came back, nor ever thereafter asserted his contract, probably feeling the cost of insurance too heavy. No question would ever have been raised had he not died in March, and his representatives then, of course, came forward with this claim for $10,000, as worth a struggle to get.

FOURTH.

If, for any reason not apparent, the company were bound in law to have done anything more than they did do, the injury to the assured was by his own acts waived.

It is well settled that by requesting the payee to again present the draft to Greenwood for paymont, knowing that he had received no protest, he thereby waived any informalities therefore existing.

Harniss *vs.* Davis Co. Ass'n., 46 Mo., 357.

Salisbury *vs.* Renick, 44 Mo., 554.
Matthews *vs.* Allen, 16 Gray, 594.
Thornton *vs.* Wynn, 12 Wheaton, 183.
Sigerson *vs.* Matthews, 20 How. (U. S.), 496.

FIFTH.

The whole theory upon which the learned Judge submitted the case to the jury was that the company accepted the draft on July 14th as a payment of the debt. Such was the only logical result of his repeated directions. And he himself so says at fol. 110: "There is a clause in this policy which authorizes all unpaid premiums to be deducted. I think the inexorable logic of a verdict for the plaintiffs, on the instructions I have given you, is that the premium has been in fact paid by the taking of this draft; but that question is out of the way by the consent of the plaintiff that you may deduct the draft and interest on it from any verdict in their favor."

The theory of the draft being a payment of the debt was wholly erroneous, and the premium was never paid. Deceased never lost a dollar from the draft.

A man cannot pay his debt by his own promise unless it is specially agreed to be so received. No one else had accepted it or was liable thereon. The burden of showing that he had paid the premium was on the plaintiffs; proof of giving his own check or an order on a man not indebted to him is not sufficient. The receipt given makes no difference; it may always be shown that no money was received.

Bradford *vs.* Fox, 38 N. Y., 289.

Retaining the draft did not affect the question.
Nichols *vs.* Michael, 23 N. Y., 267.

This is especially true, as the contract was to terminate on October 14, without notice to any party.

And by the very terms of the draft itself, it is seen that it was not contemplated or agreed that it was to be received as payment of the debt. It expressly provided that if not paid at maturity the premium was in default and the insurance thereby terminated.

Roehner *vs.* Knick. Life Ins. Co., 63 N. Y., 160.

Baker *vs.* Union Mutual L. I. Co., 43 N. Y., 284.

Yet the Court held directly the opposite. He charged the jury at length in regard to the company being in default in not protesting the draft for non-payment and giving formal notice thereof, and thereby the drawer was discharged on the instrument and the premium was thereby paid, unless our default was excused; that the only excuse would be lack of funds, and that was no excuse if he had expectations, when he drew it, that it would be paid; and that if Greenwood had paid other drafts that was reasonable expectation. What was left for the jury?

And on this point of expectation, it may be conceded that it would have weight as showing that the assured contemplated no actual fraud on the company by giving the draft, but of what avail is it on the question of whether, as a fact, Greenwood would have paid it on October 14th, in the absence of advices? In the charge, that if Greenwood had paid drafts before "without regard to the state of funds," it would be reasonable expectation that he would pay this one, the Court likewise omitted to call attention to the fact that it appeared that Greenwood always demanded advices, whether he had funds or not, and particularly if he did not.

The same reasoning is shown throughout the charge. The Court further says at fol. 101: "I have been in-

clined to think that if the draft was presented for payment on that day at that place and payment refused, the condition of the policy was broken; and on the other hand, if no presentment for payment was made at that time and place there has been no breach. * * * But I have concluded that the true measure of the duty of the company is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed, in reference to this paper, all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any holder would be under the commercial law," etc.

Assume that the company was bound to follow the ordinary proceedings of a holder of commercial paper. Then the company should have presented the draft for payment on October 14th, and have protested it for non-payment and served legal notice thereof. Suppose it had done all this, what would have been the condition of this policy on the morning of October 15? Was it alive? If so, what kept it alive?

Again, the drawee of ordinary commercial paper has till midnight to pay it. Then by the law merchant the holder would have twenty-four hours in which to protest and serve notice. During that interval was the *policy* alive? If so, upon what consideration to support it?

But here, by the terms of the policy, the premium was to be paid by 12 o'clock noon. This company could have declined to receive this money during the afternoon, but yet Greenwood—if no special character belonged to this instrument imposing particular duties on the drawer—would not have been sooner obliged to pay.

According to the theory of the learned Judge, the policy would have terminated not by the default of the assured on October 14th, but by the giving of the pro-

test, and notice 24 hours later, a voluntary act on the part of the company, and one which could in no way benefit the assured, since it was then too late to make the payment.

And on the other hand the policy was continued in force, not by the payment of the premium, but by the omission of the company to protest a draft in which it had no interest, upon which it sought to establish no liability, which was the obligation of the primary debtor, which he well knew would not be, and was not paid, and upon which there ~~were~~ no endorsers.

CONCLUSION.

The judgment should be reversed.

LESLIE W. RUSSELL,
Of Counsel for Plaintiff in Error,
32 Nassau Street,
New York.

115-339

RECEIVED
APR 6 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 73—OCTOBER TERM—1884.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,

against

PLEASANT H. PENDLETON, et al.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR,

in opposition to vacating Judgment and dismissal of Writ of Error.

LESLIE W. RUSSELL,
Counsel for Plaintiff in Error,
32 Nassau St., N. Y.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,

against

PLEASANT H. PENDLETON *et al.*,
Defendants in Error.

No. 73 on October, 1884, Term.

Brief for Plaintiff in Error

In opposition to Rule to show cause why Judgment of January 5, 1885, should not be vacated and the Writ of Error dismissed.

Statement of the Case.

It appears from the Record that this action was brought by the defendants in error, Pleasant H. Pendle-

ton and three others, children of Samuel H. Pendleton, deceased, against the Knickerbocker Life Insurance Company, to recover upon a policy of insurance issued by that company upon the life of Samuel H. Pendleton for the benefit of his children.

The action was begun in the State Court of Tennessee, and removed to the Circuit Court of the United States.

Pleas were duly filed, and the issues formed were brought to trial at Memphis, in November Term, 1880. Such proceedings were thereupon had that the plaintiffs, Pendletons, had a verdict. Judgment was entered thereon in favor of "Pleasant H. Pendleton *et al.*" and against the insurance company (p. 44).

The Court by order entitled "Pleasant H. Pendleton *et als.*, by next friend" *vs.* The Company, filed the supersedeas bond at $20,000 (p. 45).

Proceedings were thereupon taken by the company to bring the case here by writ of error.

The writ (p. 45) in describing the judgment gives the name of the only person mentioned therein, Pleasant H. Pendleton. It was duly allowed, tested and served. It is endorsed "P. H. Pendleton *et al.*" *vs.* The Company; and service thereof is duly acknowledged by Messrs. Humes & Poston, for the *defendants* in error.

The printed record at page 45 gives this acknowledgment as for the "defendant in error." That is incorrect, and a certificate from the Clerk of this Court is handed up in that behalf.

Thereupon a citation was issued, which, in the body thereof, appears to be directed to P. H. Pendleton alone (p. 46). It recites the writ of error wherein "you are defendants in error." It is endorsed "P. H. Pendleton, *et al*," and service thereof was acknowledged by Humes & Poston, attorneys for *Pendletons*.

The same error as above stated occurs here in the printed record, and the same certificate of the Clerk of this Court is submitted thereon.

In pursuance of the order above referred to a supersedeas bond of $20,000 was thereupon given. It is given *to all the plaintiffs below*, naming them (p. 47, fol. 129).

The sureties thereon were examined at the instance of counsel for the obligees, the appearance being for all the defendants in error, and duly justified; and the bond was allowed and filed.

The record was filed here in October, 1881, and the case was here during 1882, 1883 and 1884. It was reached in its order in November, 1884, and argued on the merits, without objection. Two briefs were filed here by the opposing counsel, each entitled "Pleasant H. Pendleton *et al*," and each filed for the "defendants in error."

This Court handed down its decision January 5, 1885, reversing the judgment and awarding a new trial. It is reported in 112 U. S., 696.

Counsel have now received an order to show cause why the judgment of reversal should not be vacated and the writ dismissed, which order is recited as issuing upon the ground that the judgment below was in favor of Pendleton and three others, while the writ and citation were against P. H. Pendleton alone, without summons or severance.

The question to be discussed is whether the judgment of the Circuit Court, which has been pronounced by this Court to be erroneous and unjust, with directions to set the same aside, shall be reinstated because of an alleged defect in the form of the proceedings.

First.—The writ of Error is the process by which the Supreme Court gets jurisdiction to act.

It is the mandate of the Superior to the inferior

Court to remove the record and proceedings, and is not directed to the persons of the parties litigant. The removal of the record gives to the Supreme Court jurisdiction to further act, although for the purposes of giving the defendants in error their day in Court, process, if necessary, must be issued to bring them in that a fair opportunity may be had for them to participate in the further proceedings.

That further process is called a citation; and its only object is to gain a compulsory jurisdiction of the *persons* of the defendants in error. It is untirely unnecessary where their appearance and submission to the jurisdiction is willing and voluntary. *Ratione cessante cessa ipsa lex.*

It has been uniformly held by this Court that an appearance waives all defects in the citation, and admits due notice of the writ of error.

Where the decree below was in favor of Martha Phipps and Mary Rice, wife of Charles Rice, and the citation was directed to Martha Phipps and Mary Rice, wife of George Bowers, and service was accepted by their attorney, this Court refused to dismiss the writ, saying that the misnomer could not have misled, and the acceptance of the service of the notice showed that there had been no misapprehension.

Peale *vs.* Phipps, 8 Howard, 256.

Where the citation is irregular, being signed by the Clerk instead of the Judge who allowed the Writ of Error, an appearance cures the irregularity, and a motion to dismiss the writ at a Term succeeding the appearance comes too late.

The appearance admits due notice of the Writ of Error.

Chaffee *vs.* Hayward, 20 Howard, 208.

Even though no citation issue at all, the defect is

cured by a general appearance and permitting a Term to pass.

Buckingham *vs.* McLean, 13 Howard, 150.

There being a full appearance for the defendants in error, any defect in the citation is now waived, and the present case presents a still stronger position for the plaintiffs in error than any cited, for here three terms have passed without motion or objection, a full argument and submission upon the merits had, a decision rendered that the judgment is unjust, and the opportunity for a new Writ of Error gone forever.

Therefore the objection must be confined to the alleged defect in the Writ of Error.

Second.—The Writ of Error is directed to the Judges of the Court below. It should be properly signed, sealed and tested. It should also give a sufficient description of the cause to enable the Court below to intelligently act. That is the only purpose of a reference to the cause. Inaccurate description of the case itself is not a vital defect, if it is sufficient for the lower Court, which knows its own records, to comply without mistake.

A reference to decisions made prior to the Revised Statutes allowing amendments to writs of error justifies the assertion that an insufficient description of the title of the cause is not a jurisdictional defect.

A writ of error was brought by M. D. "and others." It was held defective and dismissed; but the Court permitted it to be amended and heard the cause.

Deneale *vs.* Archer, 8 Peters, 526.

That the title of the cause was sufficiently described for the information of the Court below and of the par-

ties is evident from the return which was made, the appearance for the defendants in error, and the submission of the cause without objection.

It will be noticed that the judgment below names Pleasant H. Pendleton alone, although it adds "*et al.*" This is insufficient, and may possibly have led to the error. Why has not a party suing out a writ of error the right to name the person who alone appears to be named in the judgment, and thus follow the judgment in the writ of error by which he seeks to have that judgment reversed? Would it have added strength had he added "*et als.*" to the name of Pleasant H. Pendleton? This Court has held it would not.

Deneale *vs.* Archer, *supra.*
Miller *vs.* McKenzie, 10 Wall., 582.

Even without amendment, the mandate of the Supreme Court may now direct the reversal of that judgment in which Pleasant H. Pendleton is named as plaintiff, and which all the persons who commenced this litigation appeared before this Court to defend.

Third.—But if the writ be defective it may be amended, even by the addition of the names of parties.

Revised Statutes, Section 1005.
Pearson *vs.* Yewdall, 5 Otto, 294.
T. & P. Railway Co. *vs.* Kirk, 111 U. S., 486.

And when a writ of error was returnable on the 3d Monday of December *next*, which was wrong, it was held that the writ might be amended.

McVeigh *vs.* United States, 8 Wallace, 640.

The return day is essential to be named in the writ of error; yet, under the old practice, even the Supreme Court exercised the power to amend by filling in the blank, holding that reference might be made to the endorsement which showed the time of filing and when it should have been returnable.

Mossman *vs.* Higginson, 4 Dallas, 12.

It will be noticed that the endorsement of the writ of error here has the addition of "*et als.*" to the name of Pendleton, and that the service of the writ of error is acknowledged underneath this endorsement for the *defendants* in error by their attorneys.

Attention is again called to the original record on file instead of the printed transcript.

Service of process on the attorney or counsel was sufficient.

Bacon *vs.* Hart, 1 Black, 38.

Where a writ of error was directed to the Judges of the district *aforesaid*, with no district mentioned, it was allowed to be amended in the Supreme Court where the district appeared by the endorsement.

Course *vs.* Stead, 4 Dallas, 22.

This writ has all the essentials of a good writ except the description of the suit; and that sufficiently appears so that no mistake could be made. The endorsement may be referred to as explanatory, and the error, if it be one, was made by the Clerk of the Court for which the plaintiff in error should not be injured.

The language of the statute is amply sufficient to allow the amendment. No prejudice to the defendants in error can exist for they make no objection to the proceedings, voluntarily appear and argue the cause in the apparent conviction that the judgment can be sustained, relying on the the security of su-

persedeas bond, which recites the granting of the writ and provides for its prosecution. The supersedeas bond may also be considered in connection with the writ of error, being simultaneously filed, and runs to all the defendants. They appear upon the justification of the sureties, accepting the form of the bond, and if they had succeeded would have collected the judgment, with interest and costs, by the security of the bond. The Supreme Court unanimously pronounced the judgment erroneous; and therefore its injustice is no longer within the domain of controversy. No new writ of error can now be granted; and a further discussion of the propriety of exercising the discretion to amend appears futile.

Therefore if this Court is not of the opinion that a mandate for the reversal of the judgment in the record can be properly issued, an amendment of the writ of error should be granted *nunc pro tunc*, naming the additional persons who commenced the action below; or if that remedy is not practicable, an order should be made allowing the plaintiff in error to so amend the writ of error, and directing that when amended it be placed upon the record as amended.

Fourth. —Defects in the writ of error or citation, even though substantial, must be taken advantage of before judgment.

Heirs of Wilson *vs.* Insurance Co., 12 Peters, 140.

Where the writ of error was improperly issued by the Clerk of the Supreme Court of Louisiana, and the citation signed by one of the Judges of that Court, it was held that a motion to dismiss on the ground that such a writ could not remove the record into this Court,

came too late after the cause had been here two terms, and the defendant in error had once moved to complete the record in a respect which had no reference to the defect complained of.

McDonogh *vs.* Millaudon, 3 Howard, 693.

An appearance and allowing the case to stand over a term cures any defect in the service.

Farrar *vs.* U. S., 3 Peters, 459.

It will be noticed that many of the causes for dismissal, which were held sufficient before the amendatory statute (sec. 1005) are now disregarded. No case has been found by counsel where the writ of error was dismissed after appearance of both parties on the argument and judgment pronounced.

Fifth.—The obtaining of a summons and severance is a technical proceeding, practiced where some of several persons against whom the judgment was obtained refuse to join in the application for a writ of error, and little regard is paid by the Court to its omission if substantial notice has been given.

Masterton *vs.* Herndon, 10 Wallace, 416, 418.

The citation is not a part of the record necessarily, and the presumption is that one was issued when the writ of error was allowed.

Innerarity *vs.* Byrne, 5 Howard, 295.

Sixth.—The mandate of the Court should issue to the

lower Court carrying into effect the judgment of this Court reversing the judgment named in the writ of error; or if that be not practicable then an amendment allowed, as prayed for. Reference is made to the papers which are herewith presented as explanatory of the situation of the case, and the transcript of record on file in this Court.

If for any cause the writ of error must be dismissed, and this erroneous judgment retained in force, the supersedeas bond, which recites the granting of the writ, should be discharged, as it accomplished nothing of avail to the plaintiff in error.

LESLIE W. RUSSELL.
Of Counsel for Plaintiff in Error,
32 Nassau Street,
New York.

115-339

Office Supreme Court U. S.
FILED.
OCT 10 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 4.

Error to the Circuit Court of the United States

FOR THE WESTERN DISTRICT OF TENNESSEE.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,

against

PLEASANT H. PENDLETON, and others,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR,

ON RE-ARGUMENT.

LESLIE W. RUSSELL,
Counsel for Plaintiff in Error,
32 Nassau St., N. Y.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

PLEASANT H. PENDLETON *et al.*,
Defendants in Error.

No. 4.

Brief for Plaintiff in Error.

This case was argued and submitted in this Court at the October, 1884, Term, and judgment was handed down reversing the judgment below and directing a new trial. The case has passed into the reports.

112 U. S., 696.

Thereafter it was discovered that the original writ of error and citation were defective, in that the writ de-

scribed the judgment below as being in favor of Pleasant H. Pendleton alone, whereas there were other parties thereto; and it appearing that the citation thereupon had been directed to said Pendleton alone, it was claimed that the others were not bound by its decision, although counsel had admitted service and appeared for all without objection.

Thereupon this Court directed the writ of error to be amended, and a new citation to issue to all the parties, with permission to them to take a rehearing, which they have elected to do. The amended writ and citation have been duly served.

The parties represent no new interest, and their presence raises no new question. They are all children of Samuel H. Pendleton, the insured, and are united in interest. The case was fully argued in this Court for all parties, was fully considered, and the opinion of *Mr. Justice Bradley* was an exhaustive one upon all questions involved. It is not considered useful to do more than briefly state the case, and the questions claimed to have been overlooked by this Court, especially as the point now raised for defendants in error was passed upon by the Court before, and doubtless given all the attention required.

Statement of the Case.

The action was brought in the Circuit Court of Shelby County, Tennessee, by the defendants in error to recover of the plaintiff in error the sum of $15,000 on a certain policy of insurance issued by the plaintiff in error upon the life of Samuel H. Pendleton.

The case was thereafter removed to the Circuit Court of the United States for the Western District of Tennessee.

The policy of insurance was issued on the 14th day of July, 1870, and insured the life of Samuel H. Pendleton in the sum of $10,000 for the benefit of the defendants in error; and by its terms the sum of $364.60 was to be paid on the 14th day of July in each and every year as the annual premium thereon (Policy at p. 13).

It was further stipulated by said policy that the omission to pay the said annual premium on or before 12 o'clock noon of the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation or indebtedness (other than the annual credit or loan), for premium or interest on said policy, should then and there cause said policy to be void, *without notice to any party or parties interested therein* (p. 14).

At the end of the first year, on July 14, 1871, the assured was not ready to pay his premium, and he gave to the agents of the company two drafts on Moses Greenwood & Son, of New Orleans: one a sight draft of $44.50, and the other in the words following:

"$325.00. AUBURN, ARK., July 14, 1871.

"Three months after date, without grace, pay to the "order of the Knickerbocker Life Insurance Co., three "hundred twenty-five dollars, value received, *for pre-* "*mium on policy No. 2346, which policy shall become* "*void if this draft is not paid at maturity.*"

"S. H. PENDLETON.

"To MOSES GREENWOOD & SON,
"New Orleans, La."

Thereupon the agents gave him a renewal receipt for the year (fols. 39, 54).

This draft the agents deposited in a Memphis bank

for collection. By its terms it became due October 14, 1871. It was by the bank forwarded to a New Orleans bank, its correspondent, for collection. In both cases the banks received the draft with instructions of "no protest" (fols. 57, 70).

On September 29, 1871, the draft was received at New Orleans, and the same day presented to the drawee for acceptance, which was refused (fols. 54, 56, 65, 88). It was thereupon returned to the Memphis bank, and by that bank again sent to the New Orleans bank on October 3 (fols. 57–66), with the same instructions of "no protest" (fols. 57, 70).

Thus far no conflict as to the facts exists. As to whether actual demand for payment was made of Greenwood on October 14, some doubt has been assumed.

Proof was given tending to show that the draft was presented for payment at maturity, and payment refused.

The draft was not paid at maturity, and on November 17th, was called for by the Memphis Bank and returned to it.

The assured died the following March, and the draft was never paid.

The learned Judge below held that the company was bound, in regard to this draft, by the rules governing ordinary commercial paper, and were obliged to proceed with it as any holder should under the law merchant; that it was its duty to *protest it for non-payment*, and give legal notice thereof; and it was precluded from relying on the breach of the contract unless otherwise excused.

Various other questions arose in the case, in regard to the proofs of death, the effect of the refusal to accept the draft, the effect of there being no funds in the drawee's hands to meet the draft, and a question of a waiver by the insured; but no discussion of these mat-

ters will now be made. The entire theory of the Court below in regard to the effect of this draft was so erroneous, that this argument will be confined thereto.

ASSIGNMENTS OF ERRORS.

(See fols. 92 to 97, and 113 to 120.)

1. The Court erred in refusing to instruct the jury that if they believed from the evidence *either* that the drawer had not placed in the hands of the drawee funds to meet the said draft at maturity, or that *it was presented for payment at or after its maturity, and was not paid, the policy of insurance became void* (fol. 94).

2. The Court erred in charging the jury that the duty of the plaintiff in error in relation to this draft is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed in relation thereto all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any other holder would be under the commercial law (fol. 114).

3. The Court erred in charging the jury that the neglect of the plaintiff in error to discharge the duty of a holder of commercial paper in reference to this draft would only be excused on the same grounds as would excuse the performance of the duty by the holder of any other commercial paper (fol. 114).

4. The Court erred in charging the jury that it was the duty of said plaintiff in error to fix the liability of the drawer of said draft by demand of payment, *protest and notice thereof*, or to impose that duty on some other; and that said plaintiff in error was obligated to

notify the drawer promptly and legally of any failure of the drawee *to accept or pay* (fol. 115).

5. The Court erred in charging the jury that the letter of November 20, 1871, from defendant's agents, was not legal notice of non-payment, and that the assured was clearly discharged unless the neglect was excused, *and that by this neglect and the neglect to protest and give legal notice of non-acceptance, the company precluded itself* from relying on a breach of the condition in the policy; and that the draft became payment in fact, and there was no breach of the conditions unless, on the facts of the case, the neglect has been excused (fol. 116).

POINTS.

I.

The policy was not in force when the assured died.

The contract in the policy provided that it should terminate on the non-payment of the premium, without any notice to the parties interested therein. The company might have insisted on the money on July 14. Instead it waived it for three months by taking the draft. In no other respect were the rights of the parties changed. The company did not release the covenant to pay the premium when it now became due. It did not volunteer to give notice. The draft itself renewed the contract that the policy should cease if the draft was not paid at maturity.

The renewal receipt did not affect the matter. The condition in the draft remained binding. It may be shown that no money was received.

Bradford *vs.* Fox, 38 N. Y., 289.

Even if the assured was not bound to show payment, the measure of the company's duty was only to present the draft for payment. If it was not paid, their right to treat the contract as broken became complete.

Protest and notice were then unnecessary, save for the purpose of holding the drawer or any endorsers *to their liability on the draft.*

There were here no endorsers. The question was between the parties alone.

The company could have further waived the premium and kept the policy alive, or it could terminate the risk and relinquish its claim on the draft.

It did the latter. Thereby the assured has had three months insurance for nothing.

On the other hand, if it had protested the draft and given notice thereof, it would now be claimed, and perhaps well claimed, that that very act was evidence of an election to fasten a liability on the draft, and thereby keep the policy in force.

In short, upon the theory of the Court below the company continued the policy if it omitted the protest and notice; and it likewise continued it if it attempted to collect the draft by proceeding against the drawer by protest and notice.

The error lies in treating the draft as a *payment* of the premium.

There is no evidence here that the draft was received as payment. A man cannot pay his own debt by his own obligation, unless it is expressly agreed. The draft was not accepted, and no one else had become liable thereon.

The debt was that of the assured and not that of the beneficiaries. The contract, although for their benefit, was not their contract. The company had no claim against them.

It cannot be twisted into the obligation of a third person. He was interested in behalf of his children. He made the contract himself, paid the premiums himself, and retained sole charge of the policy. In such cases he is not a third party. On the contrary, the beneficiary has not even a vested right in the policy.

Union Mut. L. I. Co. *vs.* Stevens, 19 Fed. Rep., 671.

But the opinion already rendered by this Court needs no fortification. The rehearing was directed, not from any doubt of the correctness of the decision, but only because of the defect of parties hereinbefore mentioned.

See opinion of Mr. JUSTICE BRADLEY, 112 U. S., 696.

II.

One other point only will be noticed here. The opposing counsel claims that the errors of the Court were harmless, and this Court should not reverse the judgment, because there was "no evidence at all for the jury as to the presentment of the draft for payment."

The point is not well taken. Conceding the burden of proof to be on the company, there was abundant evidence to sustain a finding of a demand for payment.

The cashier of the New Orleans Bank says (fol. 56): The draft was received from the Memphis Bank; was presented for acceptance, which was refused; was returned and again sent back for collection, and on both occasions with instructions of "no protest."

(Fol. 57.) That the usual course of business was to demand payment on the day of maturity, sometimes on the following day.

(Fol. 59.) That the custom was to serve the party with notice of maturity.

And in answer to a direct question at *fol.* 60, he gives the following :

"7th Q. From your examination of the endorse-"ments on the draft, in connection with your knowl-"edge of the course of business of the Louisiana Na-"tional Bank, as stated by you, would you say whether "or no said paper has been presented for acceptance "and payment as other commercial paper sent to you "for collection through your corresponding banks ?

"A. Yes, it was presented for acceptance and for "payment, as in all similar cases paper sent to us for "collection, which is the custom on the part of the "Louisiana National Bank in giving prompt attention "to all business entrusted to its care."

And in answer to the third cross-interrogatory at fol. 62, he says again :

"Q. Do you know, of your own knowledge, that "said draft was presented for either acceptance or pay-"ment ?

"A. Yes, for both, from the fact that the rules of "the bank made it necessary, in the ordinary course "of business, to present both for acceptance and pay-"ment."

This evidence is not only sufficient to go to the jury, but uncontradicted it creates a presumption of law that the demand was made.

It appears beyond question that it was the custom and the duty of the officers of the bank to present such paper for payment. In the absence of denial it will be presumed that it was done.

Omnia rite acta praesumuntur.

Thus, it is held that where directors are required to approve the bonds of officers, in an action on such bond, it will be presumed that it was approved in the absence of any record thereof.

Bank of U. S. *vs.* Dandridge, 12 Wheaton, 64.

Where it was the custom at a hotel to deposit all letters left for guests in an urn whence they were distributed to the rooms, the presumption is that a letter left there, addressed to a guest was received by him.

Dana *vs.* Kemble, 19 Pick., 112.

Where it was the custon at a mill to give a receipt to the owners of rice delivered there, and A has delivered rice, the presumption is that he was given a receipt.

Ashe *vs.* DeRosset, 8 Jones (L.), 240.

In the absence of proof to the contrary it will be presumed in favor of a sale on execution, that the Sheriff has duly posted the proper notices of sale.

Wood *vs.* Morehouse, 45 N. Y., 368.

Again, it was held that a railroad time table was good evidence to contradict a witness as to the time of the actual arrival of a train, and the Court puts it upon the principle that the presumption is that the employees of the road perform their duties according to the regulations of the business.

Barker *vs.* Railroad, 24 N. Y., 599, 603.

It is submitted therefore that the unquestioned proof of this custom and duty of the officers of this bank, until contradicted, is ample evidence for the jury on this question, and that this Court will not decide, as matter of law, that no demand for payment was made.

How much stronger the proof of unvarying custom is to establish such a fact, than the statement of a witness, that he remembered this one presentment for payment out of perhaps ten thousand, and yet the learned counsel would concede that this witness could competently prove the fact.

It is corroborated by the fact of the drawer having no funds and by Greenwood's subsequent letter that he could not pay till he received advices.

It may well be added that it is very doubtful if the burden of proof in this behalf is on the company at all. Of course it would be in an action *on the draft*. We are not counting on the draft. The question is did the assured break the contract. The production of the draft is *prima facie* proof that it was not paid. We think the burden then rests upon the other side to show that it was by our default.

III.

The judgment should be reversed.

LESLIE W. RUSSELL,
Of Counsel for Plaintiff in Error,
32 Nassau St,
N. Y.

Office Supreme Court U. S.
FILED.
NOV 10 1884
JAMES H. McKENNEY.
CLERK.

115-339

Supreme Court of the United States.

No. 73.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

P. H. PENDLETON, ET AL.

ADDITIONAL ARGUMENT AND BRIEF

OF

D. H. POSTON AND W. K. POSTON,

Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

No. 73.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

P. H. PENDLETON, ET AL.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

Our original brief was filed near the adjournment of the last term, without having seen any brief for plaintiffs in error, they having filed none until October 30th, 1884.

This is filed as additional to the one heretofore filed by us.

And first, we will state that the opinion of Judge Hammond, overruling the motion for a new trial, was very full and elaborate, discussing the questions involved, both upon principle and authority with his usual ability and learning.

See Pendleton *vs.* Insurance Co., 7 Fed. Rep., 169.

The brief of counsel for plaintiff in error argues, first, the assignment of error upon the charge of the judge as to waiver of preliminary proofs of death, and we now reply to that argument.

The evidence as to notice and proofs of death consisted of letters from A. O. Douglass and W. F. Douglass, the uncles

of plaintiff, to Greene & Lucas, the managers of the Memphis Branch Office, of dates March 29th, 1872; April 2d, 1872, and April 9th, 1872, and letters in reply from the latter, of dates April 2d and April 26th, 1872.

See Record, pp. ~~26, 27~~ 16, 17 and ~~28~~ 18.

These letters were written from the uncles of plaintiffs, immediately after the death of Doctor S. H. Pendleton, informing the company of his death, and asking instructions about making out the proofs of death. The replies of Greene & Lucas utterly ignore the request for instructions about proofs of death, and deny all liability of the company upon the special and sole ground that the policy was forfeited and cancelled for non-payment of the draft.

They said nothing about the proofs of death, sent no blanks nor information for making out the same, nor ever returned or offered to return either the $325 draft, or the $44 paid on said 2d premium. Afterwards, on April 22d, 1872, W. F. Douglass, the guardian of plaintiffs, through one K. Smith, presented the policy and papers to Greene & Lucas, at their office, and demanded payment, which they refused on the ground that the policy was forfeited on account of the non-payment of the $325 draft.

We insist that—

1st. The letters from the uncles of plaintiffs were both "notice and proofs of death," within the meaning of the policy.

2d. If not so, they were treated by the company as a sufficient compliance in that regard.

3d. The company, under the circumstances, after due notice, *waived* proofs.

The policy does not require *sworn* proofs. No proceeding before any legal tribunal was pending. Perjury could not be predicated of false statements in the proofs, if sworn to. The only fact as to which proof could be required was the single fact of death. The informant was under no greater obligation in making a sworn than an unsworn statement, and hence the credibility of the statement would not be increased by its being sworn to. The whole subject was merely a settlement between parties, out of court, of an asserted liability under a contract. Upon what principle can it be supposed that it was intended this business transaction should be taken out of the ordinary course of other business transactions, and the party entitled to a certain sum of money be required to produce *sworn* proofs, where the contract does not require it, before being entitled to claim payment?

The familiar rule that contracts, wholly drafted and prepared by one side, are to be construed most strongly against the draftsman, has been applied to insurance policies, along with carriers and other like contracts. The word "proofs" must, in such cases, be taken in its popular, and not technical and legal, sense. It may be well doubted whether an officer, otherwise qualified, does not violate his duty in administering oaths not required nor authorized by law. At all events, construing the word in the light of the surrounding circumstances, and of the object in view, and resolving all doubts against the company, can it be said that by the word "proofs" was meant *proofs* in such form as is required in legal tribunals, where they were not intended for use in a legal proceeding, and where the addition of the oath added nothing to the credibility of the statement.

The use in the sentence of the word "*satisfactory*" proof is important on this question. The requirement is "*due*" notice and *satisfactory* proof. Satisfactory to whom? Of course, satisfactory, or what should be satisfactory, to the company. These proofs are everywhere in the cases and in the books treated and called *preliminary* proofs, understood to mean something different from the *final* or ultimate proofs required in the courts. If it were conceded that private corporations or individuals had the legal right to require the establishment by affidavit of the facts upon which it transacted its business, such a course of business would be so phenominally unusual that the requirement would have to appear, by very explicit and express language, admitting of neither cavil nor doubt—all the presumptions would certainly be against it. The well known fact may be looked to that in making the contract and contracting the liability the company acts upon the *unsworn* statement of applicant in regard to age, health, habits, etc.—certainly important matters in the transaction, going to the foundation of the liability.

As a rule the successful simulation of death in order to get insurance is very rare and most difficult of accomplishment.

The *preliminary* proofs are only intended to *satisfy* the company. If it is not *satisfactory* to the company, it is not doubted that the company can refuse payment and require the fact to be established by legal proofs in the form required in legal proceedings. It is a well known fact that insurance companies have agencies permeating the whole country, and this record shows that this company had in the particular section. The *fact* of death is generally easily ascertain-

able. If in exceptionally rare cases attempt is made to impose on the company in this particular, its agents are at hand to inquire into and expose the fraud.

We insist therefore that, upon no proper rule of construction, can the words "satisfactory proof" be held to mean sworn proofs.

This court, in a case where the policy stipulated to pay "ninety days after due notice and satisfactory *evidence* of death," ruled that the proof need only be as to the *sole* fact of *death*.

Insurance Co. *vs.* Bodel, 95 U. S., 232.

The same effect is the case of—

Insurance Company *vs.* Schwenk, 94 U. S., 593.

So in Massachusetts it was decided that only such proof as was required by the policy was necessary, and that neither the usage of the particular company, nor the general usage and understanding of insurance companies generally, could determine what should be necessary, unless plaintiff knew or had notice of it when he took the policy.

Taylor *vs.* Ætna Life Ins. Co., 13 Gray, 434.

It is true that it has been decided that such a stipulation of the policy requires *sworn* proofs, as in—

O'Reilly *vs.* Guardian Ins. Co., 60 N. Y., 169.

But we insist, upon reasoning, that is unsatisfactory. The question being unsettled in this court, we insist upon the construction hereinbefore contended for as the proper logical and reasonable construction.

But there can be no doubt that the company treated as satisfactory proof of death the three letters of A. O. Douglass

and W. F. Douglass, the brothers-in-law of Doctor Pendleton, who were present at the time of his death, said letters being written from the place of the death and immediately thereafter—the first letter three days and the last letter ten days afterwards. What more *satisfactory* proof of the fact could be desired? Their statements are entirely disinterested, and of a fact which occurred in their immediate presence, and within their direct and personal knowledge. There could be no room for mistake, for they state that he died and had been *buried*. The addition of oaths to their statements would have been under no legal sanction, and would have given no greater credibility to their statements.

The matter being transacted was a private business matter, between the parties and out of court.

Did the company treat this "proof" as satisfactory? If it did, the result contracted for was reached, and it cannot change its position.

The letter of A. O. Douglass, of March 29, 1872, after stating the fact of the death, and referring to the policy, made the following request for information:

"Please advise me what steps are necessary to be taken in the premises" (Rec., p. 16), and the letter of W. F. Douglass, the guardian, of April 2, 1872, written before any reply was received to the foregoing letter, after stating the death and referring to the policy, continued:

"I hope you will aid the beneficiaries of this policy in obtaining promptly the amount thus fortunately secured to them. I write at the request of his children, my relatives, and will await your reply before taking the necessary legal steps to prove their claim in accordance with the instructions you may send."

Rec., p. 17.

The replies of Greene and Lucas, managers (Rec., pp. 16, 17, and 18) can bear no other construction than that this proof *satisfied* them of the death; their *acts* also in not sending blanks for proving the death and instructions, although especially requested to do so, necessarily meant that they were *satisfied* of that fact, and consequently dispensed with the useless formality of making "proofs" to *satisfy* them (the company) of what had already been proved to their satisfaction by the letters.

The proposition that the company *waived* proofs of death, while to a great extent dependent upon the facts involved in the proposition last argued, is not identical with it.

We contend that, upon the undisputed facts of this case, that the *company* being "in the habit of furnishing blanks for making proofs of death and giving information thereabout to applicants," (Record, p. 19,) and upon being credibly informed of the death of the insured, and specially requested to advise what is necessary to be done towards collecting the insurance, and for instructions as to necessary steps to prove the claim, and, on replying to said letters, sending no blanks, furnishing no information as to necessary steps, repudiating all liability upon the policy upon the specified and distinct ground that it had been forfeited for non-payment of the draft, retaining without any offer to return, the part ($44.50) of this premium already paid the company, and also the $325 draft. These facts established a waiver of proofs, and the facts being entirely undisputed, justified a peremptory instruction from the judge to the jury that preliminary proof of death to the company was waived, and if the leaving the question to the jury was error, it worked no harm to the company.

The proposition that such a state of facts establish a waiver of preliminary proofs is well established by the decisions of this Court, and, generally, by an overwhelming weight of authority elsewhere.

Tayloe *vs.* Merchants' Fire Ins. Co., 9 Howard, 390.
Insurance Co. *vs.* Warehouse Co., 93 U. S., 546.
Columbia Life Ins. Co. *vs.* Lawrence, 10 Peters, 507.
Brink *vs.* Insurance Co., 80 N. Y.
Prentice *vs.* Knickerbocker L. Ins. Co., 77 N. Y., 483.
Goodwyn *vs.* Mass. Mut. L. Ins. Co., 73 N. Y., 430.
McBride *vs.* Insurance Co., 30 Wis., 562.
Norwich and N. Y. Transp. Co. *vs.* Mass. Ins. Co., 34 Conn., 568.
Pitney *vs.* Insurance Co., 61 Barbour, 335.
Ætna Ins. Co. *vs.* Tyler, 16 Wendell, 385.
Francis *vs.* Ocean Ins. Co., 6 Cowen, 404.
May on Insurance, 2d ed., pp. 711, 769.
Bliss on Life Insurance, pp. 447 and 448.

Many other cases might be cited, but the above are supposed to be sufficient.

The New York cases cited in brief of counsel for plaintiff in error, if in point at all, are substantially, and some of them expressly, overruled in the later opinions of that court herein cited.

The brief of adversary counsel states that cases in the books sustaining waiver of preliminary proofs are uniformly where proofs were furnished, but were *defective*, and argues that, therefore, they have no application here.

We deny both the premise and conclusion.

The cases cited in this brief *supra*, in 93 U. S., 9 Howard, 30 Wis., 34 Conn., and others there cited, were cases where *no preliminary proof whatever* had been furnished to the company.

But if the premise were sound and conceded, the conclusion would by no means follow, for the only possible ground for holding *defective* proof no compliance with the requirement is that it is not the proof stipulated for, or, in effect, *no proof.*

Another proposition relied on by our opponents is, that the letter of M. Greenwood & Son, of Sept. 29th, 1871, (Rec., p. 34,) is a valid notice of the dishonor of the draft for non-acceptance.

But, we think, no such effect can be given it, because—

1st. It does not show expressly, or by any prior implication, a *final* and absolute presentment for acceptance; but, on the contrary, that such presentment and demand for acceptance was *held up* and *postponed* to another time.

2d. If, in other respects, it was a sufficient notice of dishonor, the record fails utterly to show that it was mailed *in time.*

3d. It was not given by any one authorized by law to give such notice.

If notice be given before the *dishonor* takes place, it is premature and ineffectual.

2 Daniel's Negot. Inst., 3rd ed., p. 87.
Chitty on Bills, (*482,) 544.
Jackson *vs.* Richards, 2 Caines, 343.

The notice, where the parties reside in different places,

must be deposited in the post in time to be sent by the mail of the day after the dishonor.

Bk. Alexandria *vs.* Swann, 9 Peters, 90.
Fullerton *vs.* Bk. U. S., 1 Peters, 605.
U. S. *vs.* Barker, 12 Wheaton, 559.
Lenox *vs.* Roberts, 2 *id.*, 373.
2 Daniel's Negot. Inst., 3rd ed., 90.

There is *no proof whatever* in the record that this letter was mailed *in time*, and if all other objections to the letter, *as notice of dishonor*, were out of the way, this would effectually preclude any such effect being given to it.

While upon an *official* certificate, showing performance of an official act, presumptions may be indulged that it was *properly* done, yet no such presumptions can apply to unofficial acts.

Instead of the record fairly authorizing the inference that said letter was mailed within the next day after its date, (Sept. 29, 1871,) the contrary is fairly, almost inevitably, inferable, for it expressly calls for an *immediate* reply: "Please write *at once* if you want it paid." All the facts and circumstances demanded an immediate reply in a matter of so much importance and urgency, and there can be no fair doubt that Pendleton did reply to it immediately on receiving it, and his reply was of date October 27, 1871, *twenty-eight* days after the letter of Greenwood & Son was written.

See two letters from G. & Son. Rec. p. 34.

Surely, if this was a matter where presumptions could be allowed, it cannot be presumed, in the face of these facts, that the letter of Greenwood & Son was mailed as early as September 30, 1871.

Another objection to this letter, *as notice* of dishonor, is

that a *drawee*, who refuses acceptance, cannot give a valid notice.

Stanton *vs.* Blossom, 14 Mass., 116.

It is also urged by our opponents that the law of *Arkansaw*, where this draft is dated, is the law of the contract, and that by it all questions of protest, demand, and notice are governed, and that it requires no notice of dishonor to be given drawers.

No authority is cited which sustains the propositions that such is the law of Arkansaw, and none can be.

Furthermore, the rule established by this court is that the law of the place of payment governs in all questions as to protest, demand, and notice.

Pierce *vs.* Insdeth, 106 U. S., 546.

That the general rules of commercial law as to negotiable paper are in force in Louisiana, and require the proper protest thereof and notice to drawers, is established and enforced in the cases of—

Bird *vs.* The Bank, 93 U. S., 96.

Musson *vs.* Lake, 4 Howard, 263.

Indeed it is well settled by this court, that a law of the State, whether evidenced by statute or decision, differing from the general commercial law, cannot be recognized as authority in the U. S. Courts.

Watson *vs.* Tarpley, 18 Howard, 517.

Oates *vs.* National Bank, 100 U. S., 239.

Finally, we claim that there is no reversible error in this record.

D. H. Poston and
W. K. Poston,
Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED.
APR 6 1885
JAMES H. McKENNEY.
CLERK.

115-339

SUPREME COURT OF UNITED STATES.

No. 668.73

THE KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
P H. PENDLETON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF AND ARGUMENT OF D. H. and W. K. POSTON, for P. H. PENDLETON, Defendant in Error, in support of the Rule to show cause why the Writ of Error should not be dismissed.

ROWE, TOWNSEND & CREIGHTON, PR., MEMPHIS.

SUPREME COURT OF UNITED STATES.

No. 669.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, *Plaintiff in Error*, vs. P. H. PENDLETON.	IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF AND ARGUMENT OF D. H. and W. K. POSTON, for P. H. PENDLETON, Defendant in Error, in support of the Rule to show cause why the Writ of Error should not be dismissed.

We insist that the rule should obtain, and the writ of error be dismissed the court.

The writ of error sued out was to reverse a *joint judgmeut* for $15,175 rendered in favor of Pleasant H. Pendleton, Cornelia E. Pendleton, Mary E. Pendleton and Francis M. Pendleton on 19th of May, 1881, against the plaintiff-in-error and the writ of error is sued out alone against P. H. Pendleton.

See record, page 451.

The citation is directed alone to him; the other three plaintiffs in the judgment below are neither named, or served, nor is there any attempt or effort to reverse, or any error complained of, except as to P. H. Pendleton, leaving the judgment below in full force as to the other three plaintiffs.

See citation record, 45.

The writ of error bond on same page is given to P. H. Pendleton alone. It is therefore clear there is no pretence in the record that any effort was made to remove the cause into this court for review as to any one except P.H. Pendleton, and the question is, can a *joint judgment* in favor of several be reversed or inquired into by this Court where only one of the party in whose favor the judgment was rendered is made a party to the writ of error or process thereunder? We say not. It has been the rule of this Court, from its very foundation, not only in writ of error cases from courts of law, but in appeals in equity to require all parties to the *joint judgment* or *decree* to be brought before the Court, or a severance be had, the court uniformly refusing to take jurisdiction except all parties be named and served with appellate process.

Phillipp's Practice, page 65.
Williams *vs.* Bank of U. S., 11 Wheaton, 414.
Owings *vs.* Kincannon, 7 Peters, 399.
Massino *vs.* Cavazza, 6 Wallace, 362.
Simpson *vs.* Greeley, 20 Wallace, 152.
Smith *vs.* Strader, 12 Howard, 327.
16 Howard, 142; 14 Wallace, 402.
Fiebelman *vs.* Packard, 108, U. S. p. 14.

So far has this doctrine been carried that this Court has uniformly held where the writ of error described the parties

"as heirs of Nicolas Williams" that the writ of error was a nullity and the Court had no jurisdiction.

See Heirs of Williams *vs.* Ins. Co., 12 Peters, 140.

In Deneale, executrix, and others *vs.* Archer et al., 8 Peters, 526. Marshall Ch J. says: "The present writ of error is brought by Mary Deneale and *others* as plaintiffs but who the others are cannot be known to the Court, for their names are not given in the writ of error as they ought to be. Mary Deneale cannot alone maintain a writ of error on the judgment, but all the parties must be joined and their names set forth in order that the Court may proceed to give a proper judgment on the case," and the writ of error was dismissed.

In Williams *vs.* Bank of United States, 11 Wheaton, 414, Chief Justice Marshall said: "The judgment in Circuit Court of Ohio was a joint judgment, upon a joint action for money lent, against three defendants, and the writ of error was sued out by one of the defendants in his own name only, without joining the others. The Court was of opinion that the writ of error should have been in the name of the three, and disallowed it." * * * * *

In Hampton *vs.* Rouse, 13 Wallace, 1875, a judgment was against three, and one alone prosecuted a writ of error. Chase C. J., held, It has often been held that in a writ of error to a joint judgment against several, all must join; and that the omission of one or more without such proceeding is an irregularity for which the writ will be dismissed," and it was so accordingly done.

In Owings *vs.* Kincannon, 7 Peters, 399, was a cause in equity wherein a joint decree was rendered against six defendants, and only two appealed, Chief Justice Marshall held

the appeal would not lie, and that all should have joined or had a severance.

In Freeborn *vs.* Protector, 11 Wallace, 82-83, a motion to dismiss for want of jurisdiction was made. Nelson J. delivering the opinion of the Court, says: "The motion is grounded upon a defect of the title of the parties in the appeal as granted. The title is "William A. Freeborn & Co. *vs.* the ship Protector and owners." This defect in a writ of error has been held fatal to the jurisdiction of the court since the case of Deneale *vs.* Archer, 8 Pet., 526, down to the present time. Smyth *vs.* Strader, 12 How., 327; Wilson *vs.* Ins. Co., 12 Pet., 140; Davenport *vs.* Fletcher, 16 Howard, 142. Nor can the writ be amended according to repeated decisions of the court. Porter *vs.* Foley, 21 Howard, 393. * * Hodge *vs.* Williams, 22 Howard, 87 * * ". and the motion to dismiss prevailed.

In all these cases, the court holding that all parties against whom or in favor of whom a joint judgment or decree was rendered, must be made parties to the writs of error *by name* and not by designation of and included in the words "*and others*" or "*& Co.*," and that no amendment could be made, but the cause should be dismissed for such defects. In fact, no distinction is made in such matter between writs of error and appeals, as such defects and omissions are equally fatal.

The same principle is thus announced in the State Courts, holding that all persons interested in the judgment must be made parties to the writ of error and brought before the Court, so that the affirmance, reversal or modification of the judgment when made should bind all.

Porter *vs.* Rummery, 10 Mass., 64.
Smetters *vs.* Ra ney, 13 Ohio (S. T.), 568.
Carr *vs.* Callaghan, 3 Littell (Ky.), 365.

The Court has uniformly held that the writ of error defective as to parties could not be amended, but must be dismissed.

Porter *vs.* Faley, 21 Howard, 393.
Hodge *vs.* Williams, 22 Howard, 87.
Freeborn *vs.* ship "Protector," 11 Wallace, 82-88

And the writ of error cannot certainly be amended now under section 1005, Revised Statutes, so as to allow of, the other three plaintiffs below being made parties to the writ of error, because—

1st. The writ of error is a new suit and the suing out thereof limited to *two years* after the entry of judgment, and the effect of such amendment would be to allow the writ of error to be sued out against said three persons in 1885 to reverse judgment rendered May, 19, 1881.

2d. Said section 1005 allows amendments of writ of error "When the statement of the title of the action or *parties thereto* in the writ is defective" * * * "provided the *defect* has not prejudiced and the amendment will not injure the defendant in error."

It being clear that the failure to make parties to the writ of error of three plaintiffs *below*, in whose favor the judgment was rendered, and as to whom a reversal of the entire judgment is sought, is not such *a defect* in the statement of parties as is meant by that section, which evidently intended that the amendment should be allowed in cases of misnomer, but manifestly not to supply the omission of vitally interested and material parties.

It has been held upon reasons that appear unanswerable

that amendments do not relate back to the commencement of the suit when such effect would prejudice or injure the rights of parties existing at the date of actual amendment.

Flatley *vs.* M. and C. R. R. Co., 9 Heiskeil, (Tenn.) 235.

Crofford *vs.* Cothran, 2 Sneed, (Tenn.) 492.

Manifestly the protection afforded these three parties below by the two years limitation against a writ of error is a substantial right which cannot be taken away from them by now amending the writ of error so as now, for the first time, to make them parties thereto.

It is settled in this Court that while defects as to citation may be waived by the acts of the parties, as by appearance, etc., that as to writs of error it is entirely different, the latter being essential and fundamental to the jurisdiction of the court.

Carroll *vs.* Dorsey, 20 Howard, 204.

In the United States *vs.* Curry, 6 Howard, 617, where an effort was made to hold the appeal not taken in time good because a general appearance had been entered, the appellant insisting that it was a matter of form and not of substance, Taney, Ch. J., on page 620, says: "It has been said that this objection is a mere technicality and may be regarded rather as a matter of form than of substance." But the court does not feel itself authorized to treat the directions of an act of Congress as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the Court by acts of Congress, and the same authority that gives the jurisdiction has pointed out the manner in which the case shall be brought before us, and we have no

power to dispense with any of these provisions, nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering existing laws—not for the court, and as the appeal has not been prosecuted in the manner directed within the time limited by acts of Congress, it must be dismissed for want of jurisdiction."

The suing out of the writ of error in the manner against all proper parties and within the time prescribed by law is necessary to give the Court jurisdiction, and then the entry of appearance is a waiver of citation, but the statutory provision cannot be waived nor can appearance confer jurisdiction.

The Court having repeatedly held that it would not entertain jurisdiction in such a case, it seems useless to pursue the matter further; but if it be true that P. H. Pendleton is before the court, yet on another ground the Court could not entertain the writ as to him, and that is, he only owns one-fourth of the $15,175 judgment, a sum below the appellate jurisdiction of the Court. We therefore insist that the judgment as rendered should be vacated and the writ of error dismissed.

D. H. POSTON,
W. K. POSTON,
For Defendants in Error.

115-329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1885.

KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs. } No.

P. H. PENDLETON AND OTHERS.

BRIEF FOR DEFENDANTS IN ERROR,

On Rehearing.

D. H. POSTON and W. K. POSTON,
Counsel for Defendants in Error.

R. C. TOOF & CO. PRS. & LITHS., MEMPHIS

In United States Supreme Court.

OCTOBER TERM, 1885.

KNICKERBOCKER LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs. } No.

P. H. PENDLETON AND OTHERS.

BRIEF FOR DEFENDANTS IN ERROR,

On Rehearing.

I.

MOTION TO DISMISS.

We respectfully insist that the writ of error in this cause should be dismissed.

The writ of error sued out was to reverse a *joint judgment* for $15,175 rendered in favor of Pleasant H. Pendleton, Cornelia E. Pendleton, Mary E. Pendleton and Francis M. Pendleton on 19th of May, 1881, against the plaintiff-in-error and the writ of error is sued out alone against P. H. Pendleton.

See record page 451.

The citation is directed alone to him; the other three plaintiffs in the judgment below are neither named or served, nor is there any attempt or effort to reverse, or any error complained of, except as to P. H. Pendleton, leaving

the judgment below in full force as to the other three plaintiffs.

See citation record 45.

The writ of error bond on same page is given to P. H. Pendleton alone. It is therefore clear there is no pretence in the record that any effort was made to remove the cause into this court for review as to any one except P. H. Pendleton, and the question is, can a *joint judgment* in favor of several be reversed or inquired into by this court where only one of the party in whose favor the judgment was rendered is made a party to the writ of error or process thereunder? We say not. It has been the rule of this court, from its very foundation, not only in writ of error cases from courts of law, but in appeals in equity to require all parties to the *joint judgment* or *decree* to be brought before the court, or a severance be had, the court uniformly refusing to take jurisdiction except all parties be named and served with appellate process.

Phillipp's Practice page 65.
Williams v. Bank of U. S., 11 Wheaton 414.
Owings v. Kincannon, 7 Peters 399.
Massino v. Cavazza, 6 Wallace 362.
Simpson v. Greeley, 20 Wallace 152.
Smith v. Strader, 12 Howard 327.
16 Howard 142; 14 Wallace 402.
Fiebelman v. Packard, 108 U. S. p. 14.

So far has this doctrine been carried that this court has uniformly held where the writ of error described the parties "as heirs of Nicolas Williams" that the writ of error was a nullity and the court had no jurisdiction.

See Heirs of Williams v. Ins. Co., 12 Peters 140.

In Deneale, Executrix, and Others v. Archer et al., 8 Peters 526, Marshall, Ch. J., says: "The present writ of error is brought by Mary Deneale and *others* as plaintiffs, but who the others are cannot be known to the court, for their names are not given in the writ of error as they ought to be. Mary Deneale cannot alone maintain a writ of error on the judgment, but all the parties must be joined and their names set forth in order that the court may proceed to give a proper judgment on the case," and the writ of error was dismissed.

In Williams v. Bank of United States, 11 Wheaton 414, Chief Justice Marshall said: "The judgment in circuit court of Ohio was a joint judgment, upon a joint action for money lent, against three defendants, and the writ of error was sued out by one of the defendants in his own name only, without joining the others. The court was of opinion that the writ of error should have been in the name of the three, and disallowed it." * * *

In Hampton v. Rouse, 13 Wallace 1875, a judgment was against three, and one alone prosecuted a writ of error. Chase, C. J., held: "It has often been held that in a writ of error to a joint judgment against several, all must join; and that the omission of one or more without such proceeding is an irregularity for which the writ will be dismissed," and it was so accordingly done.

Owings v. Kincannon, 7 Peters 399, was a cause in equity wherein a joint decree was rendered against six defendants, and only two appealed; Chief Justice Marshall held the appeal would not lie, and that all should have joined or had a severance.

In Freeborn v. Protector, 11 Wallace 82–83, a motion to dismiss for want of jurisdiction was made. Nelson, J., delivering the opinion of the court, says: "The motion is grounded upon a defect of the title of the parties in the appeal as granted. The title is 'William A. Freeborn & Co. v. The Ship Protector and Owners.' This defect in a writ of error has been held fatal to the jurisdiction of the court since the case of Deneale v. Archer, 8 Pet. 526, down to the present time. Smyth v. Strader, 12 How. 327; Wilson v. Ins. Co., 12 Pet. 140; Davenport v. Fletcher, 16 Howard 142. Nor can the writ be amended according to repeated decisions of the court. Porter v. Foley, 21 Howard 393. * * Hodge v. Williams, 22 Howard 87. * *" and the motion to dismiss prevailed.

In all these cases, the court holding that all parties against whom or in favor of whom a joint judgment or decree was rendered, must be made parties to the writs of error *by name* and not by designation of and included in the words "*and others*" or "*& Co.*," and that no amendment could be made, but the cause should be dismissed for such defects. In fact, no distinction is made in such matter between writs of error and appeals, as such defects and omissions are equally fatal.

The same principle is thus announced in the State courts, holding that all persons interested in the judgment must be made parties to the writ of error and brought before the court, so that the affirmance, reversal or modification of the judgment when made should bind all.

Porter v. Rummery, 10 Mass. 64.
Smetters v. Rainey, 13 Ohio (S. T.) 568.
Carr v. Callaghan, 3 Littell (Ky.) 365.

The court has uniformly held that the writ of error defective as to parties could not be amended, but must be dismissed.

Porter v. Faley, 21 Howard 393.
Hodge v. Williams, 22 Howard 87.
Freeborn v. Ship "Protector," 11 Wallace 82–88.

And the writ of error cannot certainly be amended now under sec. 1005, Revised Statutes, so as to allow of the other three plaintiffs below being made parties to the writ of error, because—

1st. The writ of error is a new suit and the suing out thereof limited to *two years* after the entry of judgment, and the effect of such amendment would be to allow the writ of error to be sued out against said three persons in 1885 to reverse judgment rendered May, 19, 1881.

2d. Said sec. 1005 allows amendments of writ of error "When the statement of the title of the action or *parties thereto* in the writ is defective" * * * "provided the *defect* has not prejudiced and the amendment will not injure the defendant in error."

It being clear that the failure to make parties to the writ of error of three plaintiffs *below*, in whose favor the judgment was rendered, and as to whom a reversal of the entire judgment is sought, is not such *a defect* in the statement of parties as is meant by that section, which evidently intended that the amendment should be allowed in cases of misnomer, but manifestly not to supply the omission of vitally interested and material parties.

It has been held upon reasons that appear unanswerable that amendments do not relate back to the commencement

of the suit when such effect would prejudice or injure the rights of parties existing at the date of actual amendment.

Flatley v. M. & C. R. R. Co., 9 Heiskell (Tenn.) 235.
Crofford v. Cothran, 2 Sneed (Tenn.) 492.

Manifestly the protection afforded these three parties below by the two years limitation against a writ of error is a substantial right which cannot be taken away from them by now amending the writ of error so as now, for the first time, to make them parties thereto.

It is settled in this court that while defects as to citation may be waived by the acts of the parties, as by appearance, etc., that as to writs of error it is entirely different, the latter being essential and fundamental to the jurisdiction of the court.

Carroll v. Dorsey, 20 Howard 204.

In the United States v. Curry, 6 Howard 617, where an effort was made to hold the appeal not taken in time good because a general appearance had been entered, the appellant insisting that it was a matter of form and not of substance, Taney, Ch. J., on page 620, says: "It has been said that this objection is a mere technicality and may be regarded rather as a matter of form than of substance. But the court does not feel itself authorized to treat the directions of an act of Congress as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the court by acts of Congress, and the same authority that gives the jurisdiction has pointed out the manner in which the case shall be brought before us, and we have no power to dispense with any of these provisions,

nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering existing laws—not for the court, and as the appeal has not been prosecuted in the manner directed within the time limited by acts of Congress, it must be dismissed for want of jurisdiction."

The suing out of the writ of error in the manner against all proper parties and within the time prescribed by law is necessary to give the court jurisdiction, and then the entry of appearance is a waiver of citation, but the statutory provision cannot be waived nor can appearance confer jurisdiction.

The court having repeatedly held that it would not entertain jurisdiction in such a case, it seems useless to pursue the matter further; but if it be true that P. H. Pendleton is before the court, yet on another ground the court could not entertain the writ as to him, and that is, he only owns one-fourth of the $15,175 judgment, a sum below the appellate jurisdiction of the court. We therefore insist that the writ of error should be dismissed.

II.

ON MERITS.

This cause was decided at the last term of this court, and the opinion reported in 112 U. S. 696. A rehearing was granted.

The principles of law settled in that opinion seem to us conclusive in favor of an affirmance of the judgment of the court below.

This court in that opinion held that to claim a forfeiture of the policy, payment of the draft on New Orleans must have been demanded *at its maturity.*

This was the main question in the case, upon which the decision of the case depended.

At the trial in the court below, the principal contention in the case was upon that question. Representing the plaintiffs, we made effort to have the case put to the jury upon that question alone, i. e, was or not said draft presented at its maturity to the drawers for payment?

See plaintiffs' requests Nos. 1 and 2 for instructions, record pp. 36, 37.

The court below went further, and ruled that to claim a forfeiture of the policy, the company must not only have demanded payment of the draft at maturity, but also must have caused the same to be protested and notice given to the drawer.

The requirement of protest and notice was held by this court to be error, and for this alone was a reversal ordered.

We contend that this error was entirely harmless and could have worked no possible injury to the plaintiff in error, because there was *no evidence*, or, certainly, not *sufficient* evidence of a demand for payment of the draft at its maturity to have required the case to be submitted to the jury at all.

The burden rested upon the company to prove demand of payment of the draft at *maturity;* the only evidence offered to show this was the deposition of A. Luria, cashier of the New Orleans Bank (record pp. 20–23) which proved

that said draft was sent to his bank to be presented for acceptance and for payment, but utterly failed to prove its presentment at maturity. It is true that in answering direct question 7, Luria says :

"Yes, it was presented for acceptance and for payment, as in all similar cases paper sent to us for collection, which is the custom on the part of the Louisiana National Bank in giving prompt attention to all business entrusted to its care."

Record p. 22.

Yet, on cross-examination he is asked qu. 4—"Did you in person make presentment of said draft for either acceptance or payment, or were you present when either of said presentments were made?"

Ans.—"No, for the reason that as cashier it is not my duty to present drafts for acceptance or payment."

Record p. 23.

Therefore the evidence of Luria, the cashier, not only failed to prove presentment for payment, but, on the contrary, proved that *he knew nothing of it*, and that his duties in the bank *precluded him from having any knowledge of such matters.*

The deposition of Chas. Santanna (Rec. pp. 24–25) proved that he was the "runner" and collector of the bank during the entire year 1871 (ans. to qu. 1); that he presented the draft for acceptance (ans. to direct qu. 2–3), but he nowhere proves any presentment for payment.

This was the person whose immediate duty it was at the time to make the presentment, and although the counsel for the company in taking his deposition approached the

matter by indirection, the proof is not made, and there is manifestly a careful avoidance to ask the question direct, "What, if anything, did you do with respect to presenting said draft *for payment?*"

These were the only witnesses offered to prove presentment of the draft, and their entire evidence is in the record and fails utterly to prove, or even *to tend to prove*, any presentment for payment; therefore the burden being on the insurance company to prove this, the court would have been justified in giving a peremptory instruction to the jury to find for the plaintiffs.

In such cases this court will not reverse.

The well-established rule of this court is, that where there are no disputed facts bearing on the real matter in controversy the court may properly instruct a peremptory verdict. In such cases where the verdict is obviously right the court will not reverse, no matter what errors may have been committed by the judge.

Walburn v. Babbitt, 16 Wallace, 577.

In such cases the rule does not require that there should be absolutely no evidence *contra*, for although there may be *some* evidence in favor of a party, yet if it is *insufficient* to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render.

Herbert v. Butler, 97 U. S. 319.
Pleasants v. Fant, 22 Wallace 116.
Improvement Co. v. Munson, 14 Wallace 448.
R. R. v. Fraloff, 100 U. S. 24.
Oscanyon v. Armsby, 103 U. S. 261.

Though there be plain error in a charge, yet if the record present to this court the whole case, and it be plain from such whole case that if the court had charged rightly the result of the trial would have been the same as it was, this court will not reverse. The result is right, though the manner of reaching it may be wrong.

Decatur Bank v. St. Louis Bank, 21 Wallace 294.
Probst v. Brock, 10 Wallace 519.

Manifestly the instruction, that in addition to demanding payment at maturity, the company must have also caused the draft to be protested and due notice given the drawer, could have worked no prejudice or harm to the defendant company, when there was *no proof* or no *sufficient* proof of the indispensable fact of presentment for payment.

The generalizations of the cashier, Luria, that it was the custom or habit of his bank to do its duty in presenting paper entrusted to it for collection, were objected to at the trial, and admitted in evidence over our objection and duly excepted to (see Rec. p. 25), but his evidence meant nothing more than that his bank *generally* did its duty in that regard, and, if competent, was clearly *insufficient* to establish that a proper presentment and demand of payment was made at the maturity of this paper.

Such presumptions would not be drawn in favor of a notary public—a public officer acting under oath—that he had properly demanded payment of paper, upon evidence only that he had the paper in his possession for that purpose in seasonable time, and that he was generally accustomed to perform his duty.

Musson v. Lake, 4 Howard 262.
U. S. v. Ross, 92 U. S. 281.

In Musson v. Lake, 4 Howard 262, it was ruled that the *official certificate* of a notary public as to the protest of a bill should not be received in evidence to show its dishonor, because it failed to show that he *presented the bill* to the drawees, although said certificate stated *demand of payment* with all other necessary details, except presentment.

It was urged upon the court that the notary being a public officer, the *presumption* that he had done his duty would supply the failure of direct proof of presentment of the bill, in response to which this court (at pages 277 and 278) says:

* * * "And that they being public officers, the presumption of law is that they do their duty; and, therefore, if the protest were defective, and liable to the objection urged against it, this presumption of law would cover all such defects. *This is substituting* PRESUMPTION for PROOF *in violation of all the rules of evidence.*"

This authority goes far beyond what is required for the purposes of our case, for in that case there was direct evidence of a *demand of payment*, by proper person, upon proper person, on the proper day, while in the case at bar the proof goes no further than that the bill was sent to the New Orleans Bank to make demand of payment, and received by the bank in seasonable time.

Here the proof stops. There is not a scintilla of evidence to show any step or effort toward demanding payment.

In U. S. v. Ross, 92 U. S. 281, this court, in answer to the contention that defects of proof could be supplied by *the presumption* that public officers had done their duty, said:

"The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, *but it does not supply proof of a substantive fact.* Best, in his treatise on Evidence, sec. 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts, rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

The said two decisions of this court show clearly that, even as to *public* officers the *presumption* that they had done their duty is never allowed to supply the failure of proof of an independent and material fact; but here the act to be proved, viz., the demand of payment of this bill at maturity, was not that of a public officer, but of the New Orleans Bank, to which the bill was sent for collection.

It will not be claimed that the endorser of a note could be held upon evidence only that it was put in the hands of a notary public, in seasonable time, to make demand of payment, and protest and give notice.

Yet here the forfeiture of a large and valuable contract of life insurance is claimed upon precisely the same quantum of proof.

In the case of Manning v. Ins. Co., 100 U. S. 693, the court below, in effect, peremptorily instructed the jury as to the verdict to be rendered as to one of the main propositions of the case. This action of the circuit judge was assigned for error and it was claimed that the jury should have been allowed to *presume* the fact in controversy, as to which there was no direct proof, from other facts which were proven. In response to that contention this court said:

"But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence."

After stating certain facts in proof, the court continued:

"These were the primary facts. Everything more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely, that the renewal premiums were paid to the agents; and upon this a further presumption that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury *found upon such evidence would have been a mere guess. The evidences of fact did not go far enough.* We think, therefore, the court was not in error in withdrawing it from the consideration of the jury."

According to the principle settled by these authorities the judge below in this case would have been justified in instructing the jury to find that said draft was not pre-

sented for payment at its maturity, because the *onus* rested upon the defendant company to prove that it was, and there was no competent evidence or not sufficient evidence offered to show it. This point being settled, under the opinion of this court rendered in this cause, verdict and judgment for the plaintiffs below was inevitable, and, therefore, upon the authority of the decisions of this court hereinbefore cited, no possible error of the judge at the trial below would authorize a reversal of the judgment.

Wherefore, we contend that the judgment below should be affirmed.

D. H. POSTON and
W. K. POSTON,
Counsel for Def'ts in Error.

1115-339

IN THE SUPREME COURT OF THE UNITED STATES.

No 73. October Term, 1884.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, Pl'ff in Error,

vs.

PLEASANT H. PENDLETON *et al.*, Defendants in Error.

The petition of Charles H. Russell respectfully shows to this Honorable Court:

I am the receiver of the plaintiff in error above named, the Knickerbocker Life Insurance Company, duly appointed to administer its affairs and distribute its assets among those entitled thereto. I was appointed as such receiver December 29th, 1882.

The above-entitled case was not transferred to my charge, nor did I ever see the papers therein, until long after the expiration of two years from the time of the rendition of the judgment herein in the circuit court of the United States for the western district of Tennessee. No irregularity therein was ever called to my attention, nor did I know of the same until the issuance of the present order to show cause by this Court in March, 1885. for the vacating of the judgment of this Court of January 5th, 1885, and the dismissal of the writ of error.

Upon taking charge of the property of the said company I found that it had mortgaged three houses in the city of Brooklyn to the sureties upon the supersedeas bond herein, as security for their liability thereon, in the sum of $15,000, and has assigned to them a further mortgage of $6,000 upon property in Jersey City; and that all of said property now remains encumbered thereby, awaiting the issuance of the mandate of this Court.

Your petitioner respectfully prays leave of this Honorable Court that the writ of error herein be amended by adding the names of such other parties as appear by the record to be necessary thereto, *nunc pro tunc* or otherwise, according to the practice of this Court and the equity of the case, and that the mandate thereon may be remitted to the court below.

And your petitioner will ever pray.

Dated New York, April 2d, 1885.

CHARLES H. RUSSELL,
Petitioner.

STATE OF NEW YORK,
City and County of New York, } ss:

Charles H. Russell, being duly sworn, doth depose and say that he is the petitioner mentioned and described in and who executed the foregoing petition.

The foregoing petition, and each and everything therein contained, is true to my own knowledge.

CHARLES H. RUSSELL.

Subscribed and sworn to before me this the second day of April, 1885.

[SEAL.] SMITH DEBBAYE,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Endorsed: No. 4. In the Supreme Court of the United States. The Knickerbocker Life Insurance Company, plaintiff in error, *vs.* Pleasant H. Pendleton *et al.*, defendants in error. Petition to amend writ of error. Filed April 6, 1885.

115-339

Office Supreme Court U. S.
FILED
OCT 22 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 4.

KNICKERBOCKER LIFE INSURANCE CO., PLAINTIFF IN ERROR,

vs.

P. H. PENDLETON ET AL.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

L. W. HUMES,
Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 4.

KNICKERBOCKER LIFE INSURANCE CO., PLAINTIFF IN ERROR,

vs.

P. H. PENDLETON ET AL.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

ON REHEARING.

This case was decided at the last term, and a reversal ordered against the defendants in error. The decision is reported in 112 U. S., 696. A rehearing was granted.

This is a suit by defendants in error to recover from plaintiff the amount of a policy of life insurance.

The company plead no indebtedness, non-payment of the stipulated annual premium, non-payment of a draft for premium, and failure to give notice and proof of death.

There was a trial, and verdict and judgment against the company, and from this it sued out a writ of error.

The company contended that the trial judge erred in charging the jury that the company must present the draft for payment; that it must present it for payment after acceptance was refused, and that it was not necessary to make

formal proof of death after the company was notified and refused to recognize any claim.

This court held these were proper charges.

And the principles of law settled in the opinion in this case seem to us conclusive of an affirmance of the judgment of the court below.

This court in that opinion held that to claim a forfeiture, in the language of Mr. Justice Bradley, "the insurance company was *bound* to present the draft for payment *at its* maturity." (112 U. S., 708.)

This was the main question in the case, and upon it the decision depended.

At the trial in the circuit court, the principal contention in the case was upon that question. Representing the plaintiffs we did everything to have the case put to the jury upon that question alone, *i. e.*, was or not said draft presented for payment at its maturity? See plaintiff's request, Nos. 1 and 2, for instructions. (R., pp. 36 and 37.)

The circuit court went further and ruled that to claim a forfeiture of the policy the company must not only have demanded payment of the draft at maturity, but must also have caused the same to be protested and notice given to the drawer.

The requirement of protest and notice was held by this court to be error, and for this alone was a reversal ordered.

And the question whether there was a presentment for payment is an open one in the case. Mr. Justice Bradley, in the opinion, says:

"But *supposing* it to have been presented for payment."

And said the counsel in his brief in the court below:

"It does not affirmatively appear when the draft was presented for payment, or whether it was in fact presented for payment, but the custom of the Louisiana National Bank was," &c. &c.

We contend that the error complained of was entirely

harmless and could have worked no possible injury to the company, because there was *no evidence*, or, certainly, not *sufficient* evidence of a demand for payment of the draft at its maturity to have required the case to be submitted to the jury at all.

The burden rested upon the company to prove demand of payment of the draft at *maturity*. The only evidence offered to show this was the deposition of A. Luria, cashier of the New Orleans Bank (R., pp. 20–23), which proved that said draft was sent to his bank to be presented for acceptance and payment, but utterly failed to prove its presentment at maturity.

Luria says:

"We have on frequent occasions presented paper on the day of maturity, but cannot positively say it was done in this case." (R., p. 21.)

And he says further:

"The presentment for demand of payment is generally made the day following maturity, but frequently the presentment is made on maturity; whether on this particular case it was presented on the day of maturity or not I cannot say; this is the custom in our bank." (R., p. 22.)

It is true that in answering 7 Q. he says:

"Yes; it was presented for acceptance and for payment, as in all similar cases paper sent us for collection, which is the custom on the part of the Louisiana National Bank in giving prompt attention to all business entrusted to its care." (R., p. 22.)

Yet, on cross-examination, he is asked:

Q. 4. "Did you in person make presentment of said draft for either acceptance or payment, or were you present when either of said presentments were made?

Ans. "No; for the reason that, as cashier, it is not my duty to present drafts for acceptance or payment." (R., p. 23.)

Therefore the evidence of Luria, the cashier, not only failed to prove presentment, but, on the contrary, proved that he *knew* nothing of it, and that his duties in the bank *precluded him from having any knowledge of such matters.*

The deposition of Chas. Santana (R., pp. 24, 25) proved that he was the "runner" and collector of the bank during the entire year 1871 (ans. to Q. 1); that he presented the draft for acceptance (ans. to Q. 2, 3), but he nowhere proves any presentment for payment.

Santana was the person whose immediate duty it was to make the presentment, and although the counsel for the company in taking his deposition approached the matter by indirection, the proof is not made, and there is manifestly a careful avoidance to ask the question direct, "What, if anything, did you do with respect to presenting said draft *for payment?*"

As Mr. Chief Justice Waite said in Stewart *vs.* Lansing, 104 U. S., 511:

"It would have been apparently so easy to make the necessary proof, if it could have been safely done, that we are unable to account for its absence, except on the theory that a disclosure of the whole truth would be fatal to a recovery."

Next take the deposition of Greenwood, witness for defendants in error, and he says (R. p. 33), in answer to 3d cross-question: "I have examined the books of Moses Greenwood & Son and find no entry of the acceptance or payment of said draft. I have no recollection of said draft other than what is shown by the books and correspondence, a copy of which correspondence is hereto annexed, marked 'B.' The letter of Dr. Pendleton, of the 27th of October, 1871, (referred to and answered in our letter of the 4th of November, 1871, hereto annexed) cannot be found. The above is all the correspondence I find in relation to that draft." (R. p. 34.)

The first letter is dated New Orleans, September 29, 1871, from Greenwood & Son to Dr. Pendleton, Auburn, Ark. (R. p. 34.) They write:

"Your draft for life policy (some $330), due 14th next month, was presented this day for acceptance. Not finding any advice of it we requested them to hold till we got an answer from you. Please write at once if you want it paid."

The next letter is from the same parties to the same, and is dated November 4, 1871. They write:

"Yours of the 27th ult. received. Will pay that insurance note when presented as you request. This is the first advice we have had of it."

Is this not positive proof that the draft was not presented for payment in October, 1871, at all?

The evidence of Luria and Santana not only fails to prove presentment for payment at maturity, but, on the contrary, proves that there was no presentment.

And these, followed by Greenwood's testimony and the letters, establish that there never was presentment for payment of this draft.

The company proves a presentment for acceptance by the endorsement on the draft made at the time and the letters of the bank. These witnesses—Luria, cashier, and Santana, runner—do not recollect and have no evidence of the presentment for payment. Is this not a most remarkable thing? In one case they have all the proof positive of the presentment for acceptance, and in the other, presentment for payment, they have no proof whatever of it. Is it not conclusive that they never made a presentment for payment?

Luria and Santana were the only witnesses offered to prove presentment of the draft, and their entire evidence is in the record and fails utterly to prove, or even *to tend to prove*, any presentment for payment; therefore, the burden being on the company to prove this, the court would have been justified in giving a peremptory instruction to the jury to find for the plaintiffs.

In such cases this court will not reverse.

The leading case on this question seems to be Pleasant *vs.* Fant, 22 Wall., 116, opinion by Mr. Justice Miller. He says:

"Recent decisions establish a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon which the onus of proof is imposed."

See, also, Stewart *vs.* Lansing, 104 U. S., 511, opinion by Mr. Chief Justice Waite.

Randall *vs.* B. & O. R. R. Co., 109 U. S., 482, opinion by Mr. Justice Gray.

In Bowditch *vs.* Boston, 101 U. S., 18, the court say:

"It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court."

In such cases this court will not reverse.

In cases where the verdict is obviously right the court will not reverse, no matter what errors may have been committed by the judge.

Walburn *vs.* Babbitt, 16 Wall., 577.

In such cases the rule does not require that there should be absolutely no evidence *contra*; for, although there may be *some* evidence in favor of a party, yet if it is *insufficient* to sustain a verdict so that one based thereon would be set aside the court is not bound to submit the case to the jury, but may direct them what verdict to render.

Herbert *vs.* Butler, 97 U. S., 319; 22 Wall., 116, ante.

Improvement Co. *vs.* Munson, 14 Wall., 116.

R. R. *vs.* Traloff, 100 U. S., 24.

Oscanyon *vs.* Armsby, 103 U. S., 261.

Though there be plain error in a charge, yet if the record present to this court the whole case, and it be plain from such whole case that if the court had charged rightly the result of the trial would have been the same as it was, this court will not reverse.

In the language of this court:

"The result is right, though the manner of reaching it may be wrong."

Decatur Bank *vs.* St Louis Bank, 21 Wall., 294.
Probst *vs.* Brock, 10 Wall., 519.

Manifestly the instruction, that in addition to demanding payment at maturity the company must have also caused the draft to be protested and due notice given the drawer, could have worked no prejudice or harm to the company when there was *no proof* or *no* sufficient proof of the indispensable fact of presentment for payment.

The generalizations of the cashier, Luria, that it was the custom or habit of his bank to do its duty in presenting paper intrusted to it for collection, were objected to at the trial, and admitted in evidence over our objection, and duly excepted to (R., p. 25), but his evidence meant nothing more than that his bank *generally* did its duty in that regard, and, if competent, was clearly *insufficient* to establish that a proper presentment and demand of payment was made at maturity.

Such presumptions would not be drawn in favor of a notary public—a public officer acting under oath—that he properly demanded payment of paper upon evidence only that he had the paper in his possession for that purpose in seasonable time, and that he was generally accustomed to perform his duty.

Musson *vs.* Lake, 4 How., 262.
U. S. *vs.* Ross, 92 U. S., 281.

In Musson *vs.* Lake it was ruled that the *official certificate* of a notary public as to the protest of a bill should not be

received in evidence to show its dishonor, because it failed to show that he *presented the bill* to the drawees, although said certificate stated *demand of payment*, with all other necessary details except presentment.

It was urged upon the court that, the notary being a public officer, the presumption that he had done his duty would supply the failure of direct proof of presentment of the bill, in response to which this court say:

"*This is substituting* PRESUMPTION FOR PROOF *in violation of all the rules of evidence.*"

This authority goes far beyond what is required for the purposes of our case, for in that case there was direct evidence of a *demand of payment* by proper person, upon proper person, on the proper day, while in the case at bar the proof goes no further than that the bill was sent to the New Orleans bank to make demand of payment, and received by the bank in seasonable time.

Here the proof stops. There is not a scintilla of evidence to show any step or effort toward demanding payment.

In U. S. *vs.* Ross, 92 U. S., 281, this court, in answer to the contention that defects of proof could be supplied by *the presumption* that public officers had done their duty, said:

"The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, *but it does not supply proof of a substantial fact.* Best, in his treatise on Evidence, sec. 300, says: 'The true principle intended to be asserted by the rule seems to be that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

These two decisions of this court show clearly that even as to public officers the *presumption* that they have done their duty is never allowed to supply the failure of proof of an independent and material fact; but here the act to be proved, viz., the demand of payment of this bill at maturity, was not that of a public officer, but of the New Orleans Bank, to which the bill was sent for collection.

It will not be claimed that the endorser of a note could be held upon evidence only that it was put in the hands of a notary public in seasonable time to make demand of payment and protest and give notice.

Yet here the forfeiture of a large and valuable contract of life insurance is claimed upon precisely the same quantum of proof.

In the case of Manning *vs.* Ins. Co., 100 U. S., 693, the court below in effect peremptorily instructed the jury as to the verdict to be rendered as to one of the main propositions of the case. This action of the circuit judge was assigned for error, and it was claimed that the jury should have been allowed to *presume* the fact in controversy, as to which there was no proof, from other facts which were proven. In response to that contention this court said:

"But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence."

After stating certain facts in proof the court continued:

"These were the primary facts. Everything more was left to presumption. The jury therefore were to presume that the policies did not lapse and that they were renewed. Built on this presumption was another, namely, that the renewal premiums were paid to the agents, and upon this a further presumption that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury *found upon such evidence would*

have been a mere guess. The evidences of fact did not go far enough. We think, therefore, the court was not in error in withdrawing it from the consideration of the jury."

Another view of this question, which we think equally conclusive of the case, is this: Let's apply to it the doctrine, as it is called, of *ad diem.* This rule the courts have established for the insurance companies. It is that to save a forfeiture there must be a payment of the premium *ad diem.*

As this is so, is it not equally true that to claim a forfeiture there must be a demand *ad diem?* The *ad diem* in the case at bar was October 14th.

Look at the proof on this point, if you take it that the custom of the New Orleans Bank is proved and that it is proper and competent proof. Luria says the maturity of the draft as entered on the books of the bank was 14th to 17th October. (R., p. 23, ans. 2.) It is customary, says he, to wait until the close of bank hours to see if parties make payment; and if payment is not made, then presentment is made the following day, being the day following the maturity. (R., p. 21, ans. 3, and p. 22, ans. 5.)

So that October 18th was the day it would have been presented if this is true—four days after the *ad diem.*

But this is not all; the New Orleans Bank held this draft from October 3 (R., p. 21, ans. 2 to Luria's deposition) until November 17 (R., p. 23, ans. to X-question 7), one month after its maturity, as they claim, and, as Luria says: "However, it was retained with the expectation of collecting." Would this bank have held it until November 17th with expectation of collecting if it was presented for payment at maturity?

And thus this draft was retained for one month and five days from Greenwood's first letter of September 29th to his second of November 4th and never presented, and from November 4th, when Greenwood wrote to Dr. Pendleton, "Will pay that insurance note when presented, as you request; this

is the first advice we have had about it until its return, November 17th, and yet it was never, during this time, presented to Greenwood for payment. And thus this *ad diem* of the insurance company never came until on or after November 19th.

To continue to illustrate this view of the case let me call your attention to this further fact: The first year's premium was paid in *whole* by Pendleton's draft on Greenwood & Son, as shown in Exhibit "A" to the deposition of Greenwood, said exhibit being a statement of the account of Pendleton with Greenwood & Son, and the item being thus charged (second item on p. 31, Record):

"1870, November 18. To paid d'f't, Knickerbocker Life Ins. Co., due 29th, 364.00."

This is the full amount of the annual premium, and shows it was so paid.

"Which draft was paid on presentation," said counsel for the company in his brief.

Probably this "draft was paid on *presentation*." But what more does this entry show? That it was paid November 18th, 1870—was due 29th; 29th of what? The reasonable presumption is that this was the 29th ultimo it was due, and that was October 29th.

So that while it may have been "paid on *presentation*," yet this shows it was past due when it was paid twenty days, nearly a month.

All this shows that on July 14th, 1870, this company issue a policy, which provides on its face in express terms that the annual premium must be paid in *cash* in advance. The company first take the note of the insured, due November 1st after date, then they take a draft due October 29th after date, and allow this to stand unpaid until November 18th after date.

This shows their manner of dealing with the insured, and when, by their own conduct, they have established and in-

duced a certain course of dealing, they are bound by it, and will not now be heard to complain or allowed to take advantage of it.

This shows what a loose course of dealing the company carried on.

I call attention to these facts to show how "*faithfully*" the company have carried out this contract, and how "*truly*" they are entitled to have its terms now rigidly enforced, for the reason that by its express terms the failure to pay in *cash* on July 14th of every year avoided the policy, and yet from the day this policy was issued to the date of Pendleton's death he never paid one cent in cash on any 14th of July.

Is this a business-like manner? Can you rely on their statements in carrying out exactly their part of the contract? Must you not take all the presumptions against them? It seems to us claims to be prompt, precise, and exact come with poor grace from such a party. It may do well for them to claim the *ad diem*, but it will be hard on them, we think, if it is enforced against them.

No conduct in any transaction was ever so grossly or unpardonably loose as that of the company in this; and it is so apparent from the day this policy was issued until this suit was brought; hence it is too late now for them to attempt to patch it up. If there are any little irregularities on Pendleton's part in this transaction it must be admitted that they were induced by the loose course of conduct of the company towards him; any one after an investigation of the record in this case will concede this.

As to who induced this course of action, for example, take Pendleton's letter of June 27th, 1871, to the managers of the company at Memphis, Tennessee. He asks if he can postpone the time of payment of his premium, as their agent, Garvin, told him he could. Then read their reply to Dr. Pendleton, Auburn, Arkansas, of July 1st, 1871. They write:

"Your communication of the 27th ult., &c., was duly received. We are aware of the objections the planter has to incurring obligations before the picking season, and in your case shall endeavor to remove them. The simplest way now is the one we submit to you herewith; to make a small payment, as shown in the inclosed statement, of $44.50 in cash, and give your draft at three months from July 14th on your merchant for $325. Interest is charged at six per cent. per annum. On receipt from you of these, we will at once forward you renewal papers," &c. &c. This is signed by the managers of the company at Memphis, Tennessee.

It was complying with the above direction out of the results of which this lawsuit grew.

I call attention to this additional fact to show that in the transaction the company not only acted for themselves, but they directed how they wanted Pendleton to act, and he did so. If any wrong has been done they caused it; and can they, in justice, equity, or right, take advantage of it?

Let me call attention to this further fact. Counsel for the company try to make something out of how the account stood between Pendleton and Greenwood when he gave the draft. The facts are these, as shown from an examination of the account: When the draft was presented September 29, 1881, for acceptance, there was something over $200 to Pendleton's credit, and before it was due he sent Greenwood cotton. When it matured October 14th there was a balance to his debit of more than the draft.

Now, take the same account when the draft for the first premium was paid, November 18, 1870. Pendleton owed Greenwood something over double the amount that he did when the draft in question was due.

Besides, when the draft in question was presented for acceptance, September 29, 1871, there was a sight draft for $44.50, and they paid it.

The draft was dated July 14th, 1871; due "three months

after date, *without grace.*" It was therefore due October 14th, 1871, *fixed.*

It is true the production of the draft on the trial *prima facie* establishes its non-payment; but the question is, Was it presented for payment at maturity? If not, why not? Whose fault was it?

What was Pendleton's obligation in regard to this draft? When it is *due* Moses Greenwood & Son will pay it on presentation to them in New Orleans, La.

What was the contract of the company? We will present it for payment at maturity.

Then in whose power almost alone rested the ability to carry out the contract? By whose conduct could it be defeated? The company. On them rested the duty to be performed, *i. e.*, present it for payment at maturity.

Then came Pendleton's part of the contract—Greenwood & Son will pay it.

Did not the company's failure to present it for payment at maturity put it beyond Pendleton's power to perform his part of the contract?

There are three cases where an obligor is excused from the fulfillment of his contract—

1st. When it becomes impossible by the act of God.

2d. By the act of law.

3d. Or the act of the *obligee himself.*

The case at bar is the 3d. The company, the obligee, itself rendered the fulfillment of the contract by Pendleton on his part absolutely impossible, by failure to present the draft for payment at maturity. They made it their paper, and made it an absolute payment and discharge of the obligation for which it was given.

Is it not the truth that this draft was never presented for

payment; that this *ad diem* of the insurance company never came, and that this policy was never forfeited until after the company heard Dr. Pendleton was dead, and until after his children made claim for what the company knew was due? Does not this record abundantly establish that this was the fact? The company's acts now are the devices created for the necessity of the hour to get the company out, if possible, of paying what it knew to be justly due. And can you believe anything else? I submit you cannot.

Forfeitures are not favored in the law.

They are strictly construed. They are often the means of great oppression and injustice, says this court in Insurance Co. *vs.* Norton, 96 U. S., 242.

Like the old common law of the forfeiture of a lease, which required you to go on the land, to the most prominent place on it, to the front door of the house, and demand the rent, and declare a forfeiture, and the tenant had until 12 o'clock that night to pay it, it is still strictly construed.

The forfeiture is inserted for the benefit of one of the parties, and it is entirely optional with that party whether he will claim it or not. He can claim it if he wants to. He can waive it if he wants to. It is optional.

Then, from the facts, it is to be determined whether the forfeiture was claimed or waived.

And most confidently do I submit all the facts in this case show there never was a forfeiture. There was never a breach of the contract on defendant's part.

And, in concluding, this record shows that one of the sureties on the supersedeas bond was a director in this company.

And I hope it is not improper for me to state that this company have become hopelessly insolvent since this case was appealed, and that collateral security was placed in the sureties' hands at the time they went on this bond to idemnify them.

And if a reversal is ordered merely to go through the formalities of another trial, the result of which is bound to be the same, and the supersedeas bond is released, it in effect operates as a denial of justice to defendants in error.

The question of jurisdiction is fully argued in the brief already on file.

L. W. HUMES,
Counsel for Defendants in Error.